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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 739

MATTHEW J. CONNELLY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JACOB M. LASHLY,
JOHN H. LASHLY,
PAUL B. RAVA,
706 Olive Street,
St. Louis 1, Missouri,
ALAN Y. COLE,
815 Fifteenth Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioner.

LASHLY, LASHLY & MILLER,
St. Louis, Missouri,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Matthew J. Connelly, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on November 15, 1957.*

* A separate petition for certiorari is being filed by T. Lamar Caudle, who was a co-defendant and co-appellant in the courts below.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not yet reported, and is printed as Appendix A to this Petition. The opinion of the District Court is unreported and is printed as Appendix C to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 15, 1957 (Appendix B). Rehearing was denied on December 18, 1957 (Appendix D). On December 20, 1957, Mr. Justice Whittaker extended the time for filing the petition for writ of certiorari to and including January 23, 1958 (Appendix E). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Fifth Amendment's command that a person cannot be compelled to be a witness against himself permit a person to be subpoenaed to testify before a grand jury considering his indictment, without warning of his true position? Should an indictment so procured be dismissed or, at least, should the evidence so procured be suppressed?

2. Does the intentional failure of two jurors truthfully to respond to questions propounded to them by the trial judge on *voir dire* violate the the right to fair trial guaranteed by the Fifth and Sixth Amendments?

3. When a judge who presided over a 38-day trial dies before finally deciding motions for acquittal and mistrial upon which he had twice reserved ruling during trial, and subsequent motions for a new trial,

may a successor judge—who never heard or saw any of the 66 witnesses, or the two defendants who took the stand on their own behalf—pass upon all of these motions, and impose sentence, without depriving petitioner of the due process of law guaranteed by the Fifth Amendment?

If certiorari is granted, petitioner intends also to present the following questions for consideration on the merits:

4. Was petitioner's right to be tried "by an impartial jury of the State and District" where the crime was committed, *Sixth Amendment to the Constitution of the United States;* by "an impartial jury drawn from a cross-section of the community", *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220; and by a jury drawn in a manner "most favorable to an impartial trial", *28 U.S.C. Section 1865(a)*; safeguarded when the residents of the metropolitan St. Louis area, representing more than 80% of the population of the division, were excluded from the panel by express and unprecedented order of the trial judge, leaving only residents of the rural counties to serve on the jury?

5. Where petitioner's co-defendant was severed because of illness after 21 days of trial, and where post-conspiracy admissions of guilt were admitted against the severed defendant alone, should petitioner have been granted a mistrial?

6. May a self-serving journal entry made by a conspiracy defendant be admitted in evidence against his co-defendants where: (a) there is no independent proof that it was made during the existence of the alleged conspiracy? (b) it was, if anything, a narrative statement of a past transaction? (c) its contents

were contradicted by other Government evidence of record? and (d) where it was vague and uncertain on the one hand and particularly "poisonous" on the other?

7. If the points raised under the preceding questions do not, when considered separately, indicate a denial of due process, do they not when considered together, so taint the proceeding in their cumulative effect as to require that petitioner be afforded a new trial?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions, statutes and rules involved are set out in Appendix F.

STATEMENT

The single count indictment in this case (R. 1-10)** charged a conspiracy to defraud the United States in violation of Section 371, Title 18 U.S.C., naming as defendants this petitioner, former Appointment Secretary to President Truman, T. Lamar Caudle, former Assistant Attorney General in charge of the Tax Division of the Department of Justice, and Harry I.

** The symbol "Tr." refers to the original record and transcript of the testimony and exhibits as prepared by the clerk of the District Court in 23 typewritten volumes. The pleadings and pretrial proceedings are collected in Volume I, pages 1 through 573, and all references thereto are designated: Tr. ....., Vol. 1. The trial and after-trial proceedings are transcribed in Volume II (pages 1 through 53) and Volumes III through X (pages 1 through 3251). The exhibits are collected in Volumes XI through XXIII (pages 3252-4366). "R." is the abbreviation used herein for the shortened Record of the pertinent pleadings and docket entries for the use of the Court of Appeals and supplemented with the record of the proceedings before that Court.

Reference to the Appendices to this Petition are designated by the page number followed by "a."

Schwimmer, formerly a lawyer in Kansas City, Missouri. The indictment also named as co-conspirators, but not defendants, Ellis N. Slack,[1] an attorney in the Department of Justice on Caudle's staff, Irving Sachs, a St. Louis shoe broker, Shu-Stiles, Inc., a corporation of which Sachs was president, and other persons unknown to the Grand Jury.

The purpose of the conspiracy, as alleged in the indictment, was to defraud the United States of the proper administration of the Internal Revenue laws and regulations, and of the proper and faithful service of defendants Connelly and Caudle, and to commit the offenses of bribery, perjury, knowingly making false statements and entries, all for the purpose of protecting Sachs from criminal prosecution and imprisonment in connection with his violations of the Internal Revenue laws. The indictment further alleged that as part of the conspiracy Sachs and Shu-Stiles, the two taxpayers for whom Schwimmer was attorney, and Schwimmer, would promise and give money or other valuable consideration to influence the action of petitioner and Caudle, and that in turn petitioner and Caudle would corruptly influence government officials to decline criminal prosecution of Sachs.[2]

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[1] See footnote 3, *infra*, p. 8.

[2] The evidence relating to the Sachs and Shu-Stiles case indicates that, after all civil liabilities had been satisfied at the end of May, 1947 (Ex. 3-I, p. 44, Tr. 106, 1984), when it appeared that the case was being sent to Washington for determination of whether there should also be criminal prosecution, Schwimmer was retained to assist the other attorneys, Shifrin & Shifrin of St. Louis, and David Sheffrey of Kansas City (Tr. 813-15, 307, 417). The case remained in the office of the General Counsel, Internal Revenue Service, until August 1949, when it was forwarded to the Tax Division of the Department of Justice, of which Caudle was in charge. Thereafter, a question arose as to whether criminal

The indictment was returned by a St. Louis grand jury on December 1, 1955 (R. 1). Petitioner was subpoenaed to testify at a time when the prosecutor had already determined that he was a "potential defendant" and "certainly * * * involved in the conspiracy", but before the indictment had been drafted (Tr. 264, Vol. I). The prosecutor failed to warn petitioner that he was a potential defendant (Tr. 268, Vol. I). Petitioner's motion to dismiss the indictment and to suppress evidence thus obtained was overruled by the trial court, although it did order suppression of all testimony given by the defendants before the grand jury "after the commencement of the preparation of the draft of the indictment". (Tr. 2, 81-83, Vol. I).

Before the impanelling of the jury, an unprecedented order of the trial court (Tr. 3213) excluded residents of St. Louis and St. Louis County, representing more than 80% of the population of the division, leaving only residents of the rural counties of the division qualified as talesmen (Tr. 26-35, 48-52, Vol. II). A motion to quash was denied by the trial court (Tr. 3-4, Vol. IV).

The trial judge conducted the *voir dire* examination and asked of the panel several questions regarding their political activities and affiliations (Tr. 37-38, 44-

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prosecution would endanger the life of Sachs, who had been suffering from grand mal epilepsy. Upon recommendation of his two immediate subordinates, Caudle decided against prosecution. All four assistants to Caudle who testified as Government witnesses stated that the Sachs case received the same kind of consideration and disposition as any other health case (Tr. 1278, 1314, 1797, 1859-66, 2086-7).

Sachs was subsequently indicted by a St. Louis Grand Jury on four counts (Tr. 866, 1905, 1908). After a plea of guilty, the District Court in St. Louis (Judge Roy W. Harper), after an independent investigation, determined that Sachs' health precluded a sentence of confinement and imposed fines only (Ex. 155, Tr. 1826).

46, Vol. II). As evidence discovered subsequent to the trial disclosed, two lady members of the panel failed to reveal their political connections and activities (Tr. 3228-3248).

Trial of the case began on May 7, 1956, and progressed until May 24, 1956, when a continuance was granted because of the illness of defendant Schwimmer (Tr. 1520). On May 28, 1956, after 21 days of trial, the court declared a mistrial as to Schwimmer (Tr. 1535). A substantial body of evidence, including post-conspiracy admissions of guilt had been received as to him and ruled inadmissible against one or the other co-defendant (Tr. 306, 814, 819; Tr. 584-5; 586-7; 589; 873; 1249, 1253, 1256). Following the severance of Schwimmer, petitioner moved for a mistrial on the grounds that certain evidence admitted as to Schwimmer alone was of such prejudicial nature that its effects could not be eradicated from the jury's mind by the instructions of the court, and that defendants were deprived of their right to cross-examine Schwimmer (Tr. 1535-47). The motion was denied "at the present time" (Tr. 1547), and the trial was resumed as to the two remaining defendants.

The trial continued after Schwimmer's severance for 17 additional days; the total trial days numbering 38. Over 60 witnesses testified in person, and petitioner and Caudle testified over a five day period. The transcript aggregated 3251 pages, exclusive of more than 1000 pages of exhibits.

The crucial evidence as to petitioner focused on two matters: six telephone calls which he made on behalf of Schwimmer, and an oil royalty transaction into which he was led by Schwimmer and Tom Evans. Petitioner had known Evans, a Kansas City businessman and a close friend of President Truman, since the early forties (Tr. 727, 2442-5). Through Evans in 1944,

petitioner met Schwimmer, attorney and friend of Evans of long standing (Tr. 2446, 727-8). Over the years, petitioner was called upon to help Schwimmer and Evans on any number of different matters, *pro bono*, business and professional, ranging from introductions to atomic scientists, Palestine problems, making hotel reservations, and the like (Tr. 2451-5, 776-82, 2472-3, 765-8). The Government's evidence showed that during the two and one half year period, August 1948-January 1951 the petitioner made the following six phone calls to arrange the following appointments for Schwimmer: one call to Internal Revenue Commissioner George Schoeneman (Tr. 1923); one to General Counsel Charles Oliphant (Tr. 582, Vol. V); two to Caudle (one for a continuance and the other for an appointment, Tr. 2597-8, 2601); and two to Caudle's secretaries for appointments (Tr. 1587). The issue presented by these calls is not so much what was said, but the motives and implications involved and whether they were part of the routine services rendered by petitioner to callers at his office, or whether they were efforts on his part to corruptly influence other Government officials with regard to the Sachs case.

The oil royalty transaction presented a similar issue of intent: was it entered into as a *bona fide* business investment or was it, as the Government contended, the conscious acceptance of a bribe from Schwimmer?

At the conclusion of the trial, the court ordered withdrawn from the consideration of the jury the allegations of the indictment charging the substantive offenses, including bribery (Tr. 3130).[3] On June 14th,

[3] On March 29, 1957, a press release from the Department of Justice announced that Slack had been cleared of all charges and had resumed his duties as chief of the Appellate Section of the Tax Division. The Department of Justice also announced that it had informed Slack's counsel that it would not object to a motion to strike Slack's name from the indictment.

the jury returned a verdict of guilty against both defendants.

At that time the court had under consideration (a) petitioner's renewed motion for mistrial originally filed when Schwimmer was severed (Tr. 2888, 1536-8); and (b) petitioner's motion for judgment of acquittal on the main ground that the evidence was insufficient to make a submissible case (Tr. 2888, 2910). On June 19th petitioner filed a joint motion with Caudle for judgment of acquittal or in the alternative for a new trial reiterating all grounds previously advanced and urging in addition the erroneous admission of certain prejudicial evidence, particularly Government Exhibit 100-J (R. 119-126).

On July 7, 1956, prior to the day set for the hearing on these motions, the trial judge, Rubey M. Hulen, met his tragic death (Tr. 484, Vol. I). Judge Gunnar H. Nordbye was thereupon appointed as successor judge pursuant to Rule 25, F.R. Crim. P. (Tr. 487, Vol. I).

Petitioner filed supplemental motions for new trial on the grounds that (a) new intervening facts, namely, the death of Judge Hulen, deprived petitioner of the determination of pending motions by the trial judge, who twice had expressly reserved decision thereon (Tr. 2888, 2910), and who alone had "the feel of the case;" and (b) newly discovered evidence disclosed that two jurors had failed to answer material questions propounded by the trial court upon the *voir dire* examination (Tr. 497, Vol. I).

After hearing, all motions were overruled by the successor judge (63a) who ordered petitioner and Caudle committed for two years and fined $2,500.00 (Tr. 562, Vol. I). On appeal, the Eighth Circuit affirmed the convictions (Appendix A), and thereafter denied the joint petition for rehearing (Appendix D).

REASONS FOR GRANTING THE WRIT

I. The Grand Jury

Petitioner was first subpoenaed to appear before the Grand Jury on June 13, 1955. At that time, so far as appears, he was called as a witness, and was not then considered a potential defendant.[4] Petitioner was thereafter recalled under a new subpoena five months later on November 18, 1955. By that date, according to the prosecutor himself, the petitioner "certainly was regarded * * * as having been involved in the conspiracy" and "appeared a potential defendant" (Tr. 264, Vol. I). Despite petitioner's position, he was given no warning other than:

> "Q. Mr. Connelly, you have been before the grand jury before and you understand your constitutional rights, I am sure."

to which petitioner replied: "Yes, sir." (Tr. 268, Vol. I).

It was not until November 21, when Connelly voluntarily appeared before the Grand Jury to correct an error in his previous testimony, that the prosecutor warned him specifically that the "grand jury is considering, among other things, whether it will take any

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[4] When petitioner appeared before the Grand Jury on June 13, 1955, the investigation covered a wide range of subjects concerning various officials of the Truman administration, with no emphasis on the Sachs case. At that time the following colloquy occurred:

> "Q. Mr. Connelly, we follow the practice of advising all former government officials of their rights. I am sure you are familiar with this but we follow that practice. Are you aware of the fact that you have a right to decline to answer any question on the ground that your answer might tend to incriminate you?
>
> "A. Yes, sir." (Tr. 259, Vol. I).

action with respect to you personally" (Tr. 261, Vol. I).

Judge Hulen was obviously annoyed by the use to which the Grand Jury had been put in this case. He observed that "the record would have been better, had they [petitioner and Caudle] not been called after the subject of indicting them was being considered by the Grand Jury" (Tr. 396, Vol. I). Nevertheless, he declined to dismiss the indictment, and ordered suppressed only the Grand Jury testimony procured from the defendants subsequent to November 22nd—the date upon which the prosecutor had commenced the "preparation of draft of indictment ultimately returned" (R. 52).

By recognizing that any testimony given to the Grand Jury after November 22, 1955, by petitioner and his co-defendant should be suppressed, the trial court held: (a) that petitioner and Caudle should not have been called to testify at such a time; and (b) that they had been inadequately apprised of their true position in the investigation. But why the 22nd rather than the 18th, when the prosecutor had already marked his targets? The only possible answer is that the trial court believed that the duty owed them under the circumstances came into being only after the indictment was set down on a piece of paper, but not before; and that the fact that the prosecutor and the grand jury both knew who were to be indicted was not enough.

The simple statement of the proposition is enough to show its weakness. The distinction makes petitioner's constitutional rights hinge upon the writing of a piece of paper—and a draft at that. It places a premium on superficialities and makes substance subservient to form. And it makes it possible for a prosecutor, by the simple expedient of delaying the drafting of an indictment, to call potential defendants before a

grand jury with impunity, and "to worm out of [them] all the self-incriminatory disclosures possible." *Maffie* v. *United States*, (C.A. 1, 1954) 209 F. 2d 225, 228.

We do not believe that the Fifth Amendment's guaranties that a person cannot be forced to testify against himself can be so easily circumvented or disregarded. We believe that the obligation to warn a person that he is the target of a grand jury investigation comes into being when he is known to be the target of that investigation, and not when a piece of paper is drafted which says so.

The decision in *United States* v. *Edgerton* (D. Mont., 1897) 80 F. 374, reflects this realistic point of view. In *Edgerton*, the indictment was quashed because a clearly-marked-for-prosecution "witness" was not informed by the prosecutor that his own conduct was the subject of investigation. This approach has been embraced in many state court decisions which hold that the mere summoning of a potential defendant before the grand jury is ground for quashing the indictment.[5]

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[5] *E.g. People* v. *Seaman*, 21 N.Y.S. 2d 917, 920 (Sup. Ct. 1940); *People* v. *Luckman*, 164 Misc. 230, 297 N.Y.S. 616 (1937); *People* v. *Bermel*, 71 Misc. 356, 128 N.Y.S. 524 (1911); *People* v. *Gillette*, 126 App. Div. 665, 111 N.Y.S. 133 (1908); *State* v. *Rixon*, 180 Minn. 573, 231 N.W. 217, 218 (1930); *State* v. *Naughton*, 120 S.W. 53, 58-64 (Mo., 1909); *State* v. *Gardiner*, 88 Minn. 130, 92 N.W. 529 (1902); *Jenkins* v. *State*, 65 Ga. App. 16, 14 S.W. 2d 594 (1941); *State* v. *Smith*, 56 S.D. 238, 228 N.W. 240 (1929); *State ex rel. Poach* v. *Sly*, 63 S.D. 162, 257 N.W. 113 (1934); Cf. *Taylor* v. *Commonwealth*, 118 S.W. 2d 140, 142 (Ky. 1938); *State* v. *Caperton*, 207 S.W. 795, 796 (Mo., 1918); *Culbreath* v. *State*, 113 So. 466 (Ala. 1927).

See also *Maffie* v. *United States* (C.A. 1, 1954), 209 F. 2d 225 where the court recognized that the situation of a witness himself "under suspicion . . . approaches that of an accused person at a criminal trial, who may elect to keep silent altogether." 209 F. 2d at 228-29.

Another line of cases has followed the principle that only the formal issuance of an indictment bars the prosecutor from calling a defendant before the grand jury.[6]

Judge Hulen declined to follow either the cases epitomized by *Edgerton* or the cases applying the "formal indictment" test. Instead, he adopted as the test in time the commencement of the preparation of a draft of the indictment—a unique compromise, without support or precedent.

The Court of Appeals failed utterly to deal with the important constitutional problem presented. It held only that petitioner "was apprised of his constitutional rights" (7a), but it did not "encumber" its opinion with a more precise analysis of just which "constitutional rights" it had in mind. If the Court below was addressing itself to the constitutional rights of witnesses, this is entirely different than the constitutional rights of potential defendants.

Witnesses may properly be subpoenaed to appear and testify before a grand jury; they have the option to refuse to answer specific questions on grounds of self-incrimination, and courts have generally held that they need not be warned of this option.[7] In contrast, a per-

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[6] *E.g. United States* v. *Lawn* (S.D.N.Y., 1953) 115 F. Supp. 674, 677; see also *United States* v. *Benjamin* (C.A. 2, 1941) 120 F. 2d 521, 522; *Mulloney* v. *United States* (C.A. 1, 1935) 79 F. 2d 566, 578-80; cert. den. 296 U.S. 658; *United States* v. *Hirsch* (C.A. 2, 1934) 74 F. 2d 215, 219, cert. den. 295 U.S. 739; *O'Connell* v. *United States* (C.A. 2, 1930) 40 F. 2d 201, 205, app. dismissed 296 U.S. 667; *United States* v. *Price* (S.D. N.Y., 1908) 163 F. 904, 905, aff'd, 216 U.S. 488; *United States* v. *Grossman* (D.N.J., 1957) 154 F. Supp. 813, 816-817; *United States* v. *Manno* (N.D. Ill., 1954) 118 F. Supp. 511, 517. In *Benjamin*, *Hirsch*, *Price* and *Grossman*, the "witnesses" had been advised of their right to refuse to answer incriminating questions.

[7] Compare *United States* v. *Scully* (C.A. 2, 1955) 225 F. 2d 113, 114-15, cert. den. 350 U.S. 897; with *United States* v. *Grossman* (D.N.J., 1957) 154 F. Supp. 812, 816.

son against whom an indictment is pending, like a defendant in a criminal case,[8] may not be called at all, and the indictment will be dismissed if he is; he need not claim his privilege.[9]

It is only when a potential defendant is adequately apprised of the situation confronting him that he may waive his rights and become a witness. Such a warning presumably assures that the testimony elicited is not coerced, but voluntarily or "freely given", even though under subpoena, as was noted in *United States* v. *Klein* (C.A. 2, 1957) 247 F. 2d 908, 921, cert. den. 355 U.S. — (Jan. 13, 1958), upon finding that "the defendants were lawyers of training and experience" and that "they were represented throughout these earlier proceedings * * * by resourceful counsel" (*Ibid.*).

Exactly the converse situation obtains here. Petitioner is neither a lawyer, nor was he represented by any counsel prior to or at the time of his fateful appearance before the St. Louis grand jury on November 18, 1955. On that occasion, the prosecutor, by highly questionable tactics,[10] elicited from him unwarranted

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[8] *United States* v. *Housing Foundation of America* (C.A. 3, 1949) 176 F. 2d 665, 666.

[9] *United States* v. *Lawn, supra;* see also *United States* v. *Miller* (E.D. Pa., 1948) 80 F. Supp. 979, 981.

[10] Totally lacking in the prosecutor's interrogation of petitioner before the grand jury was "that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense . . ." *Berger* v. *United States*, 295 U.S. 78, 84. Connelly was led to admit that it was a reasonable inference that a letter he wrote to Schwimmer on May 3, 1948, related to the Sachs case (Tr. 1940). At that time, the prosecutor had in his possession but did not disclose the letter from Schwimmer which Connelly answered on May 3, 1948 (Tr. 2521). Both Connelly's letter and Schwimmer's letter to which he replied, had reference only to a trip to Washington of General Hildring, the

admissions which were fully exploited at the trial, in a compounding of errors.

This testimony was relied on by the trial court as the basis for admitting Exhibit 100-J (Tr. 1997). And the successor judge relied upon it as the basis for his determination that a prima facie case had been made out against petitioner. He found it "difficult to reconcile Connelly's claim of making a *bona fide* business investment in an oil royalty *when it appears that when he testified before the grand jury,* he was unable to state whether the royalty cost him $1000.00 or $4200.00" (57a, emphasis supplied). The suppression of this "tainted" evidence unquestionably would have had a critical effect on the outcome of the trial.

The divergent paths which the courts, both federal and state, have travelled in attempting to define the constitutional rights of potential defendants have created uncertainty concerning a vital phase of the administration of criminal justice. "No doubt it would be a boon to prosecutors," one circuit court has remarked, "if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him isolated from the protection of counsel and presiding judge and insulated from

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new Presidential appointee on Middle Eastern affairs, a matter obviously not related in any way to the Sachs case (Connelly Ex. 10, Tr. 4258).

An analogous occurrence took place with regard to a letter from Schwimmer to Connelly of January 5, 1948 (Tr. 1929, 770-1, 2320-3, 2327; Ex. 102, text Tr. 4103). Again, Connelly was questioned about the amount of the loan he made to purchase the oil royalty on the basis of admittedly erroneous figures. He was not referred to the correct amounts involved, although it plainly appeared that the prosecutor had access to information which revealed the correct amounts (Tr. 1916-17, 1942-3; Exs. 76-B, 76-C, Tr. 1100).

the critical observation of the public." *Powell* v. *United States* (C.A. D.C., 1955) 226 F. 2d 269, 274. But despite the significance of the issue, the "serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure" continues unsettled. *Ibid.*

The question is one which has troubled the Courts of Appeals. Though the Second Circuit has, like Judge Hulen, condemned the practice of summoning potential defendants "as a matter of ethics or fair play or policy," *United States* v. *Scully* (C.A. 2, 1955) 225 F. 2d 113, 116, cert. den. 350 U.S. 897, it has confessed to "some difficulty in establishing a clear cut rule as to the necessity of warning under these circumstances." *United States* v. *Klein* (C.A. 2, 1957) 247 F. 2d 908, 920, cert. den. 355 U.S. — (Jan. 13, 1958).

The governing standard for instances where potential defendants are hailed before grand juries under subpoena and, without adequate warnings, asked to be witnesses against themselves, has never been established by this Court. The diversity of view prevalent among the various federal and state courts will continue, thereby leaving the constitutional rights of such defendants unclear, until this Court sets the definitive guideposts. We think this case contains all the ingredients for a clear determination of the problem.

II. The Petit Jury

At the outset of the trial proceedings, petitioner's motion to conduct the *voir dire* examination was overruled by the trial court, and the Court proceeded to conduct the *voir dire* (R. 104). *Inter alia,* the jurors were asked two questions:

"Have any of you or the immediate members of your family, mother, father, brother, sister or husband or wife, or children, other than the gentleman who was sheriff, have you or any immediate members taken part in behalf of either political parties in political affairs such as a candidate for office or committee worker?" (Tr. 37, Vol. II).

"The Court: Do either of you or are any members of your family affiliated or hold membership or office—we have covered county committees, but sometimes there are Democratic and Republican organizations separate from the committee, and sometimes Democratic clubs and Republican clubs? To your knowledge, are you or any member of your family any members of such club or organizations? If so, raise your hand" (Tr. 44, Vol. II).

Thus, the trial court in its considered judgment made relevant the political activities and affiliations of the jurors.

And rightly so! Petitioner and his co-defendant Caudle were, of course, high officials in the Truman Administration. Heavy pre-trial publicity referring to these defendants as the first fruits of the "tax scandals investigations" of the past Administration saturated the St. Louis area (Tr. 4278, 4280, 4270a, 4282, 4284, 4285, 4287, 4299, 4300, 4313, 4344, 4345, 4348).[11] This publicity was highlighted by official Gov-

[11] Because of the inordinate amount and prejudicial character of the publicity which continued to the eve of the trial, petitioner, on January 20, 1956, filed a motion for change of venue to the District of Columbia under Rule 21, F.R. Crim. P. (R. 11, 24, 30). The motion was denied (R. 43). A petition for mandamus to compel the transfer was denied by the Court below, without prejudice, however, to a reconsideration of the question of transfer in the light of new developments (R. 68-9). On April 12, 1956, petitioner filed a supplemental motion in the District Court for transfer,

ernment releases, an unprecedented interim report of the grand jury (Tr. 4285), and by the announcement of the Attorney General on April 3, 1956, that the outcome of the impending trial of petitioner and his co-defendants "will affect and probably determine the entire course of the general inquiry" (Tr. 4288).

Thus, the public from which the jury was to be drawn had been heavily imbued with the plain political implications of this trial. The trial of the defendants was avowedly envisioned as the means to open the door and pave the way to more sweeping investigations of even higher officials in the Truman Administration, "including one of Cabinet rank" (Tr. 4281).

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reasserting that unprecedented publicity in press, radio and television, linking the trial and petitioner to the "tax scandals of the former administration", had prejudiced the public's mind against petitioner and precluded a fair trial (R. 70, 84). A joint motion, filed April 20, 1956 by petitioner and Candle for continuance of the trial setting on May 7, 1956, was based on the barrage of new publicity given the impending trial as a result of actions taken, statements *made*, and publicity released by various official agencies of the Government in their investigation of the "tax scandals of the Truman administration" (R. 99). All these motions were overruled by the trial court on April 20, 1956 (R. 104). Defendants' application for stay of proceedings in the District Court was denied by the Eighth Circuit on April 30, 1956 (R. 104) and by this Court on May 2, 1956.

The decisions of the courts below on the point stemmed from a failure to perceive the extent to which the publicity in this case, for which official agencies of the Government were directly or indirectly responsible, had prejudiced the public mind and amounted to a pre-determination of guilt. It was clear from the record, moreover, that the publicity had reached the jurors in this case (Tr. 12, 13, 14, 16, Vol. II). To conclude that they could have remained unaffected by the pervasive publicity is utterly unrealistic. In such circumstances, the overruling of the motion for change of venue and for continuance was prejudicial error. *Delaney* v. *United States* (C.A. 2, 1952) 199 F. 2d 107; see also *United States* v. *Florio* (S.D.N.Y. 1952) 13 F.R.D. 296.

The trial judge's questions concerning political activity and affiliations were designed to elicit frank disclosure of a likely source of prejudice. The gist and thrust of his questioning were clearly understood by the talesmen. Among the responses to his examination were the following revelations: two women on the panel stated that they belonged to Democratic clubs, and one man stated that he had belonged to a Democratic club two years before; another man was not certain whether he still retained membership in a Republican club; another expressed uncertainty as to whether her son belonged to a Republican club, and advised that her sister-in-law was a Republican "committeeman"; lastly, one talesman reported that he had served as Republican county clerk from 1930 to 1934 (Tr. 38-46, Vol. II).

All of these talesmen were peremptorily challenged—on party lines—by the prosecution and the defense, respectively. None was permitted to serve on the jury.

Two women, Mrs. Hoffman and Mrs. Brown, did serve on the jury. They had made no response to the two questions asked by Judge Hulen. It was subsequently revealed, however, in motions for a new trial, that both women had been members of the Montgomery Township Republican Club in 1953, 1954 and 1955 (Tr. 3233, 3236, 3237); that Mrs. Brown was on a committee of that Club (Tr. 3234); that both she and Mrs. Hoffman served as Republican Judges at political elections by appointment of the County Court in 1952 and 1954, upon recommendation of the Republican County Central Committee (Tr. 3241-2, 3245-6); and that Mrs. Hoffman's only son, who lived with her,

was then the Treasurer of the Republican County Committee (Tr. 31, Vol. II, Tr. 3236, 3240, 3244).

Both Mrs. Hoffman and Mrs. Brown had been present during Judge Hulen's examination of the panel. The purport of the questions he asked must have been as apparent to them as it was to their fellow-talesmen. Even if it were not, the answers which their co-panelists gave certainly removed any doubts which these jurors could have legitimately entertained.

Their failure truthfully to reveal their affiliations "tainted" their "relation to the court and to the parties". *Clark* v. *United States*, 289 U.S. 1, 11. Moreover, their silence necessarily deprived petitioner of the opportunity intelligently to exercise his peremptory challenges against them, in the same manner that these challenges were exercised against the talesmen who had responded, both by the Government and the defense.

Disclosure of the lack of truthfulness of these two jurors could never be made to Judge Hulen—who had conducted the *voir dire*—for it was only after his death that the true facts were uncovered, and the motion filed. Successor Judge Nordbye denied a new trial on the following grounds: (1) there was no showing that Juror Hoffman knew what position her son held in the Republican Central Committee in 1956; (2) there was no showing that either of the jurors wilfully failed to answer truthfully; (3) the jurors were not members of the Montgomery Township Committee in 1956; (4) "there is no showing that the defendants were prejudiced in any way by reason of any Republican affiliation or activities of either of these two jurors" (30a). The Court of Appeals quoted Judge Nordbye with approval and sustained his decision.

The vice in the decisions below stems principally from the view that a showing of prejudice flowing from the concealment by the two jurors is essential to require a new trial.[12] Precisely the opposite view

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[12] The other grounds upon which the Court relied are erroneous as a matter of fact or law.

(1) The conclusion is inescapable that Mrs. Hoffman knew what position her son held in the Republican County Committee. The Court's question covered affiliations of "the immediate members of your family . . . children." It is wholly beyond the bounds of reason to suggest that a woman in a small town, living in the same household with her only son, would be unaware of his office with the Committee, the same Committee which recommended her for the position of election judge (Tr. 3240, 3244-46).

(2) The fact that the two jurors had not paid dues to the Montgomery Township Republican Committee in 1956 does not justify their failure to reveal that they had paid dues and were members in the three years immediately preceeding 1956. While the question placed was by its terms limited to present membership, it followed upon and was related to the prior question which covered past activities. Both jurors, who were present during the exchanges, could not have been unaware that the purpose of the court's question was to elicit *any* information relating to political activities. See *United States ex rel. de Vita* v. *McCorkle* (C.A. 3, 1957) 248 F. 2d 1, 2-3 cert. den. 355 U.S. 873; *Clark* v. *United States* (D. Minn., 1931) 1 F. Supp. 747, 751, aff'd 289 U.S. 1.

(3) The court erred in concluding there was no showing that the jurors wilfully failed to answer. Failure of the two jurors to disclose political affiliations and connections for the evaluation of the court and counsel in light of the court's interrogation of the other talesmen (Tr. 7 ff., Vol. II) could only have been deliberate.

Even if it were not, however, the lack of that showing does not control the grant of a new trial here. A wilful refusal to answer may be relevant to determine whether the juror was in contempt of court. *Clark* v. *United States*, 289 U. S. 1; *United States* v. *Freedland* (D. N.D., 1953) 111 F. Supp. 852; *United States* v. *Lampkin* (S.D. Fla., 1946) 66 F. Supp. 821. But it is not relevant where the issue is whether the failure to respond affected the fairness of a criminal proceeding. *United States ex rel. de Vita* v. *McCorkle*, *supra*, at 5-8.

was taken by the Third Circuit (*en banc*) in *United States ex rel. de Vita* v. *McCorkle* (C.A. 3, 1957) 248 F. 2d 1, cert. den. 355 U.S. 873, where the critical failure of a juror to make full disclosure arose in circumstances strikingly similar to the case at bar. There, in a state prosecution for robbery, the robbery experience of the jurors, direct or indirect, and their close "association or relationship" with personnel of law enforcement agencies was made a material issue by the defense and the court on interrogation of the panel. During selection of the jurors, when frank disclosure of any possible source of prejudice along those lines was requested, talesmen excluded either by the defense or the court included one who mentioned an earlier robbery experience; one who stated he was related to someone working in a jail; one who knew a detective on the case; one whose home in the vicinity of the holdup had been broken into; and two who worked in banks.

One juror, who was present during the questioning of all these talesmen as well as 70 others interrogated similarly, did not disclose, when questioned, that he had recently been held up and robbed, nor that he had made a nightly journey to deposit his employers' receipts in the bank, and he did not answer affirmatively when asked if he knew any of the State's officers or personnel connected with the trial, though it was later shown he knew a number of policemen in the area. These facts, the New Jersey Supreme Court said, did not "*necessarily* raise a presumption of partiality", 248 F. 2d at 6. The Third Circuit rejected this view, reversed the District Court's denial of habeas corpus and granted a new trial on the ground that the "assurance of an impartial tribunal is too

vital to be subjected to speculation concerning the quantum of prejudice flowing from this grossly disqualified juror" 248 F. 2d at 8. See also *Marvins Credit, Inc.* v. *Steward* (Mun. Ct. App. D.C., 1957) 133 A. 2d 473, 476. Compare *Carpenter* v. *United States* (C.A. D.C., 1938) 100 F. 2d 716, 717.

Manifestly, the decision in *McCorkle* dispensing with a demonstration of prejudice with respect to a juror who failed to make full disclosure on the *voir dire* is directly in conflict with the holding of the courts below. Nor can these opposite conclusions on the prejudice issue be justified by the fact that *McCorkle* involved robbery rather than political affiliations. The political undertones of the trial here made the political affiliations of the jurors as much a matter of significance and relevancy as the "robbery experience" of the jurors was in *McCorkle*.

What the courts below disregarded, and what the Third Circuit recognized, is that the purpose of the *voir dire* examination is to enable the parties and the court to determine, from the disclosures made, whether there is reason to challenge a juror. Only if full and truthful answers are made to all material and relevant matters, so that the right to peremptory challenges may be intelligently exercised, may the parties be assured of a jury "which all may feel is reasonably free * * * from any bias and prejudice" *United States* v. *Lampkin* (S.D. Fla., 1946) 66 F. Supp. 821, 824; *Clark* v. *United States*, 289 U.S. 1, 11, affirming D. Minn., 1931) 1 F. Supp. 747; *United States ex rel. de Vita* v. *McCorkle, supra; Marvins Credit, Inc.* v. *Steward, supra; State* v. *Hermann* (Mo., 1955) 283 S.W. 2d 617, 618-19. The concealment by these two

jurors of the facts relating to their political affiliations deprived petitioner of the opportunity to peremptorily challenge them—as had been done to all the other talesmen who disclosed equivalent affiliations—and thus impaired his Sixth Amendment right to trial before an impartial jury.

The jury is the foundation of the American system of jurisprudence and this Court has shown zealous concern for guarding its sanctity. *Cf. Gold* v. *United States,* 352 U.S. 985; *Remmer* v. *United States,* 350 U.S. 377. The conflicting views which two Circuits have expressed concerning the consequences which stem from the failure of jurors truthfully to respond to *voir dire* examination cannot be permitted to stand unresolved. The conflict involves a substantial question in the administration of justice in the federal courts; applies to both civil and criminal cases; has constitutional implications of the highest order; and requires the direction which only this Court can give.

III. The Successor Judge

At the time the case was submitted to the jury, there were pending for decision before Judge Hulen motions for judgment of acquittal and for mistrial. After the jury returned its verdict, a motion for judgment of acquittal or for a new trial was filed (R. 119). Following Judge Hulen's death and the appointment of Judge Nordbye as successor, a Supplemental Motion for new trial was filed on the ground, among others, that in a case of this magnitude, the successor judge cannot recapture the atmosphere of the trial; that he is deprived of the unique position of having presided at the trial as it progressed, of evaluating the

credibility of the witnesses upon hearing their testimony and watching their demeanor on the stand, and of reconsidering previous rulings, in the perspective which is peculiarly available to the presiding judge alone (R. 127).

Judge Nordbye denied all of these motions. In doing so, he distinguished between the pre-verdict motions and the post-verdict motions. With regard to the former, he stated that Judge Hulen "did not make a specific ruling upon [them]," but held "in effect he denied those motions" (25a). With regard to the latter, he held (a) that he could properly act upon them; and (b) that they should be denied (26a-63a). The Court of Appeals sustained Judge Nordbye in all respects (Appendix A).

A. *The Pre-verdict Motions.* The size, complexity and the nature of the evidence in this case was such as to preclude a successor judge from properly and fairly performing the duties remaining to be performed after Judge Hulen's death. No more convincing proof is necessary than Judge Nordbye's mistaken conviction that Judge Hulen had "in effect" denied the pre-verdict motions for acquittal and mistrial.

It is clear from a careful reading of this record that Judge Hulen had never ruled expressly or impliedly on the pre-verdict motions. On the contrary, he had twice expressly reserved decision on them. The record indicates that when the motions were presented to him at the close of all the evidence in the case, he stated:

> "Let the record show ruling reserved on the motions" (Tr. 2888).

On the same day, furthermore, he repeated his ruling when he gave the order to bring in the jury for the final arguments:

> "Mr. Margiotti: You reserved your ruling on motions for judgment of acquittal?
> The Court: Yes. Bring the jury in" (Tr. 2910).

Judge Nordbye's assumption that the submission of the case to the jury was "in effect" a denial of the motions not only stemmed from a misreading of the record, but—more importantly—was based upon a complete failure to recognize the purpose and policy of Rule 29 (b), F.R. Crim. P. That Rule expressly authorizes a trial judge to "reserve decision on the motion [for acquittal], submit the case to the jury and decide the motion * * * after it returns a verdict of guilty." This rule even makes provision, "If a verdict of guilty is returned," for the trial judge to "set aside the verdict and order a new trial or enter judgment of acquittal."

When Judge Hulen reserved ruling on the motion for acquittal, and submitted the case to the jury, he was acting directly in accordance with these provisions of Rule 29 (b). Cf. *Shaw* v. *Hines Lumber Co.*, (C.A. 7, 1957) 249 F. 2d 434, 436-9. Only by ignoring Rule 29(b) could it be assumed that the submission of the case to the jury constituted a denial of the motions.

Through this error, Judge Nordbye "was not disposed to discuss" the merits of the motion for acquittal, and made no ruling upon it. In consequence, the motion for acquittal was decided neither by Judge Hulen nor by Judge Nordbye, a fact which the Court below completely overlooked. Judge Hulen, who heard,

did not decide. Judge Nordbye neither heard nor decided. The Eighth Circuit decided, but had not heard. Cf. *Morgan* v. *United States,* 298 U.S. 468, 481.

The failure of both judges in the District Court to exercise the discretion vested by law not only constitutes error calling for reversal, cf. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260; *Cassell* v. *Michaux* (C.A.D.C., 1956) 240 F. 2d 406, 408; but also presents a glaring illustration of the inability of a successor judge fairly to rule upon motions which had been filed prior to verdict and on which decision had been reserved.

B. *The Post-verdict Motions.* When the Court below held that the Successor Judge "did not abuse his discretion when he determined . . . that he could perform the duties to be performed by the presiding judge after verdict" (6a), it construed Rule 25, F.R. Crim. P., in a fashion inconsistent with decisions of both the District of Columbia and Second Circuits. *Brennan* v. *Grisso* (C.A. D.C., 1952) 198 F. 2d 532; *Federal Deposit Insurance Corp.* v. *Siraco* (C.A. 2, 1949) 174 F. 2d 360.[13] These cases show "a generous attitude toward a new trial when the trial judge dies before the case is disposed of." *Brennan* v. *Grisso,* supra. In the *Brennan* case, involving the partition of real estate, a successor judge's denial of a new trial was reversed where the trial judge died before filing

[13] Both cited cases were civil actions and, therefore, arose under Rule 63, F.R. Civ. P. Civil Rule 63 is the counterpart of Criminal Rule 25. See note following Rule 25, 18 U.S.C.A. Both Civil Rule 63 and Criminal Rule 25 find a common heritage in former 28 U.S.C. Section 776, Section 953, of the Revised Statutes, as amended by Act of June 5, 1900, c. 717, § 1, 31 Stat. 270. See generally 7 *Moore's Federal Practice* (2nd Ed. 1955) pp. 1452-3.

findings of fact or conclusions of law, notwithstanding the trial judge's conclusive ruling that "the bill of complaint is dismissed." The District of Columbia Circuit held that the presiding judge "was better qualified than another judge to determine the credibility and weight of the evidence . . ." 198 F. 2d at 533. In the *Siraco* case, which was a suit by a receiver on a note, the successor judge's decision for the defendant on the weight of the evidence was reversed and a new trial awarded "before a judge who can decide after seeing the witnesses", 174 F. 2d at 364, despite the stipulation of the parties referring the case to the successor on the record made before the presiding judge. See also *Smith* v. *Dental Products Co.* (C.A. 7, 1948) 168 F. 2d 516, 518-19; 7 *Moore's Federal Practice* (2d Ed. 1955) p. 1458.

Thus, two circuits have demonstrated scrupulous concern for insuring litigants all the elements of a fair trial by requiring a final decision by the presiding judge where the element of credibility is at all significant. Certainly, if in a partition action or a suit on a note it is important that the judge "who decides must hear," cf. *Morgan* v. *United States*, 298 U.S. 468, 481, no lesser standard can apply where personal liberty is at stake. Criminal defendants can hardly be accorded less scrupulous treatment than civil litigants.

And this was neither a simple nor an ordinary criminal case! The post-verdict motions for acquittal and a new trial reasserted all motions previously made and, in practical effect, searched the entire record. They raised for final consideration at the trial level all of the difficult and close questions which had arisen during the trial, including the sufficiency and weight

of the evidence which required the evaluation of the credibility of the many important witnesses—and of petitioner himself—who testified at the trial.

The Court below justified Judge Nordbye's authority to pass upon the motions on a ground which Judge Nordbye himself had not even suggested: that "there was not much to be gained by hearing the testimony of the witnesses and observing their demeanor" (6a). On the facts of this case, a contrary conclusion is necessarily compelled.

Judge Hulen, who concededly was most familiar with the problems at the trial, stated: "intent * * * is the gist of this case" (Tr. 2893). Judge Nordbye himself pointed out that the "crucial question" is not so much what appellants did, but whether they acted "with an evil and corrupt intent" (61-62a). Even the court below, in its misguided analysis, noted: the "testimony indicates that it was in the nature of circumstantial evidence by the government furnishing the basis for inferences by the jury . . . but [appellants'] testimony went to either their lack of knowledge or other explanations of the transactions . . ." (6a).

The crucial issue of the propriety of the disposition of the Sachs case by Caudle, which is the core of the Government's case, rests largely upon testimony rather than documents, and necessarily involves the credibility of many witnesses: of the doctors, particularly Dr. Tureen and Dr. Cruvant, on the one hand; and of the attorneys in the Department of Justice who testified on the health policy, on the other.[14] The demeanor

[14] See particularly testimony of Caudle's first assistant Turner Smith (Tr. 1786).

and behavior of petitioner and Tom Evans when they testified about the oil royalty transaction were basic to any determination as to whether Connelly actually viewed the transaction as a "*bona fide* business investment". How, in the face of all of this, could it be suggested that "there was not much to be gained by hearing the testimony of the witnesses and observing their demeanor . . ."?

The great number of trial days, the parade of live witnesses, the dramatic atmosphere of the courtroom, the appearance and behavior of petitioner and Caudle while they were on the witness stand for five days, all imparted a flavor which no cold typewritten record could ever convey. ". . . the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned." *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.* (C.A. 2, 1949) 175 F. 2d 77, 80.[15]

No study of the record—however careful and considered—could have given Judge Nordbye the vantage

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[15] "A 'stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' It resembles a pressed flower. * * * Demeanor, to be sure, is no infallible guide to reliability of testimony; yet, as matters now stand, it is one of the best guides available." *Ibid.*

point which is available only to one who has partaken of the actual trial.[16] This court has described the unique demands of a motion for a new trial as follows:

> "Determination of whether a new trial should be granted * * * calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. * * * Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without the delay, expense, or other hardships of an appeal' ". *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216; see also *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 574.

The "last chance" to which this Court adverted in the *Cone* case, *supra*, was denied to Judge Hulen who

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[16] In passing upon the motions before him, Judge Nordbye labored under a serious misconception of his function as Successor Judge. When he stated that "the Appellate Court will have the same opportunity as this Court to determine whether or not Judge Hulen should have granted a judgment of acquittal" (26a), he made clear he was acting as an appellate court rather than a trial court. This difference in focus is crucial. Judge Nordbye conceived his task as requiring only a determination of whether Judge Hulen had abused his discretion. Instead, as Successor Judge, he was under an obligation to exercise the discretion conferred on the trial court to weigh the evidence, consider the credibility of the witnesses, and take the "last chance to correct his own errors"—all from the perspective which only the judge who presides at the trial can acquire. See *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216.

had clearly intimated his intention to take it on at least two important problems which arose during the trial. The first of these concerned the admissibility of a crucial Government Exhibit (Exh. 100-J); and the second related to the effect upon the remaining defendants of Schwimmer's mid-trial severance.

Exhibit 100-J consisted of certain entries made by Schwimmer in his private journal, unknown to petitioner and at an undetermined time. As Judge Hulen noted, this was "a very poisonous piece of evidence" (Tr. 2884-5) which "would mislead the jury" (Tr. 2885). Six times during the trial, Judge Hulen changed his ruling as to the admissibility of this exhibit (Tr. 1373, 1467, 1639, 1996, 2733, 2881-2, 2912). Finally, though acknowledging that the question continued to give him "a lot of concern", he permitted the exhibit to remain in the record (Tr. 2912). No successor judge could evaluate—as Judge Hulen alone would have been able to do—the effect of this "poisonous" and "misleading" piece of evidence on the jury.

Even more impossible was the task of the successor judge in appraising the effect upon the jury of the severance granted to Schwimmer. Schwimmer was the key to the Government case. It was Schwimmer who contacted Connelly on the one hand, and Caudle on the other. Never did the three meet together, nor did either Connelly or Caudle ever meet Sachs or any of his other attorneys. It was Schwimmer who engineered the idea of the oil royalty investments both with regard to Connelly and with regard to Caudle. It was Schwimmer who was paid $40,000.00 by Sachs and who made the calculations reflected in Exhibit 100-J.

For a period of three weeks, Schwimmer had been the main target of the prosecution; evidence was piled up against him through documents seized from his files, in a crescendo which was climaxed by the testimony of District Judge Moore literally castigating Schwimmer (Tr. 868), and by the recitals of Schwimmer's own admissions of guilt (Tr. 873).

Then, suddenly Schwimmer was gone. He was no longer in the courtroom. Only petitioner and Caudle remained. Responsibility for the whole series of ugly events had unforeseeably devolved upon them alone. Upon them had fallen the burden of explaining and answering many of the things which only Schwimmer could have explained or answered. But Schwimmer was gone, and petitioner, with Caudle, was left to bear the brunt of a jury aroused by the devastating evidence deeply inculpating Schwimmer. How natural that the feeling of guilt prompted by him should spill over onto the two defendants who remained! As Mr. Justice Black observed in *Krulewitch* v. *United States*, 336 U.S. 440, 445, this may well have been "the weight that tipped the scales". Compare *Kotteakos* v. *United States*, 328 U.S. 750, 764-5, and *Fiswick* v. *United States*, 329 U.S. 211, 218.

Judge Hulen was conscious of the extraordinary situation thus created, but let the case go to the jury with an instruction, at the eve of the closing arguments, in which he summarized the evidence being withdrawn,[17] told the jurors he was withdrawing all

[17] He recounted Schwimmer's efforts in October, 1955, to retrieve certain of his records physically stored at the Dean Rubber Company and under the St. Louis grand jury's subpoena duces tecum. He particularly mentioned testimony of Schwimmer, later contradicted by Mr. Dean, to the effect that Mr. Hoskins, Dean's tax attorney, had authorized Schwimmer to get the records. Judge Hulen also referred to two telephone conversations between

such evidence from their consideration, and ordered them to "strike it from [their] minds entirely." (Tr. 2916). He recognized that in the circumstances of this case such an instruction was of questionable effect and expressed his considerable concern in overruling petitioner's motion for mistrial. "My present position," he said, "is to let the case proceed and if there should be a conviction, then have time to give it the study it deserves" (Tr. 2208). His death cut off the post-trial study he had planned.

The "further study" of this problem was, accordingly, made by Judge Nordbye. But Judge Nordbye had not been in the courtroom during the trial and could, therefore, only guess as to the effect which Schwimmer, and the specter of guilt he had spawned, had had on the jury. Nor could he assess, in practical terms, the efficacy of the withdrawing instruction.[18] While Judge Nordbye apparently recognized the in-

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Schwimmer and Sheffrey. In one, Schwimmer wanted to know what Sheffrey had told the prosecutor. The other was the March 18, 1956 conversation described at the trial by Sheffrey, as follows:

> "It was on a Sunday morning, and he [Schwimmer] said, 'Dave, I'm terrible worried about you,' and I said, 'You are, Harry?' and he said, 'Yes, worried what the Bar Association will do when they find out that you knew all about this and still continued in the case or knew all about something that was wrong and continued in the case,' I don't know how he put it, and I said, 'Harry, don't worry about me,' and he said, 'Well, I am worried about you and I am worried about myself too,' and I said, 'Well, Harry, if I done anything wrong, I don't know what it is, but if I have, I will just have to pay the consequences. That will be no excuse for me getting on the stand under oath and not testifying to my best recollection of what took place, and that is what I am going to have to testify to' " (Tr. 873).

[18] Judge Hulen's withdrawing instruction may only have served to revive the episode in the jury's mind, "as in the story, by Mark Twain, of the boy told to stand in a corner and not think

herent weakness of his position in this respect, he nevertheless resolved his doubts in favor of proceeding with the case for it had "taken a long time to try . . ." (25a).

Judge Nordbye cited no cases to support his view that he could properly pass upon the post-verdict motions. The Court below cited a group of cases as expositive of the "law governing the situation here presented" (6a). But these cases at most stand for the proposition that a successor judge *may* pass upon post-verdict motions; none deals with the factors or circumstances which must be considered in determining whether a successor judge *should* exercise the power he may have.[19] The majority of these cited cases, in-

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of a white elephant,"—Judge Frank, dissenting in *United States* v. *Antonelli Fireworks Co.* (C.A. 2, 1946) 155 F. 2d 631, 656, cert. den. 329 U.S. 742. The instruction may have amounted to a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else". *Nash* v. *United States* (C.A. 2, 1932) 54 F. 2d 1006, 1007. The late Justice Jackson's admonition in *Krulewitch* v. *United States*, 336 U.S. 440, 453, appears particularly appropriate:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury • • • all practicing lawyers know to be unmitigated fiction."

[19] Three cases touching on the problem presented, not cited by the Court below, are: *St. Louis S.W. Ry. Co.* v. *Henwood* (C.A. 8, 1946) 157 F. 2d 337, 342-43; *Cahill* v. *Mayflower Bus Lines Inc.* (C.A. 2, 1935) 77 F. 2d 838, 840; and *Simons* v. *United States* (C.A. 9, 1941) 119 F. 2d 539, cert. den. 314 U.S. 616. In both the *Henwood* and *Cahill* cases, the bulk of the evidence was documentary and it was plainly apparent that oral testimony was not critical to decision. In the *Simons* case, where oral testimony was important, the parties stipulated that a successor judge should continue with the trial.

cluding *Meldrum* v. *United States* (C.A. 9, 1907) 151 F. 177, upon which primary reliance was placed, were decided prior to the promulgation of Rule 25, F.R. Crim. P., and therefore are hardly compelling precedents for the case at bar. Moreover, their vintage is such as to raise doubts as to whether they have any real significance today in measuring due process of law which, as this Court has so often observed, "has never been a term of fixed and invariable content". *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 275. "In each case, 'due process of law' requires an evaluation * * * reconciling the needs both of continuity and of change in a progressive society." *Rochin* v. *California*, 342 U.S. 165, 172. Certainly these older cases cannot be squared with the more recent decisions in *Brennan* v. *Grisso, supra*, and *Federal Deposit Insurance Corp.* v. *Siraco, supra.*

One thing is plain: this Court has never passed upon the application of Rule 25, F.R. Crim. P., to a situation such as is presented in this case; nor, indeed, has this Court ever established the criteria to be considered by a successor judge in deciding whether he should decline to perform post-verdict duties and grant a new trial. Though such a decision must necessarily be based upon the facts of each case, it is manifest from the decided cases that some definitive guideposts are necessary. Moreover, this problem does not exist only with respect to Rule 25, but arises as well under Rule 63, F.R. Civ. P., which also has not been considered by this Court.

* * * * *

In ruling that the successor judge could properly and fairly pass upon the pre-verdict and post-verdict

questions of federal law which have not, but should be, settled by this Court.[20] Moreover, since a delineation of the authority of a successor judge is vital to the fair and orderly administration of justice in the federal courts, and since in the background there lurks a constitutional overtone, the question presented is one which only this Court can definitively resolve.

CONCLUSION

A few days before his death, Judge Hulen observed:

> "Connelly was a glad hander and a greeter and had done nothing more than I might have done had I been in his situation" (R. 152-3);

and Successor Judge Nordbye, even from his less strategic vantage point, conceded that the sufficiency of the evidence as to petitioner was "undoubtedly" "troublesome" and presented close questions (53-54a).

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[20] The considerations petitioner sets forth here, which demonstrate that it was impossible for the successor judge properly to pass upon the motions addressed to the peculiar discretion of the trial court, apply with even greater force to the final and most discretionary step in the proceeding—the sentencing. Here, the demeanor, the conduct, and the attitude of petitioner who was on the stand for extensive examination over a period of 2 days, and who was in the courtroom throughout the long trial, were important factors in guiding the judge's exercise of his sense of justice which is the hallmark of the sentencing procedure.

Although a successor judge has been allowed in some cases to impose sentence without having tried the case, [compare *Owens* v. *Hunter* (C.A. 10, 1948) 169 F. 2d 971, 972, with *Calvaresi* v. *United States* (C.A. 10, 1954) 216 F. 2d 891, 901, summarily reversed 348 U.S. 961] so far as appears no such procedure was ever followed in a situation comparable to the one at bar, in terms of length of trial, the number of witnesses heard, and where both petitioner and his co-defendant took the stand in their own defense. Compare *Freeman* v. *United States* (C.A. 2, 1915) 227 F. 732, with *Owens*

Under those circumstances, the principle set forth by this Court in *Glasser* v. *United States*, 315 U.S. 60, is directly applicable: "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, *but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside* as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." 315 U.S. at 67 (Emphasis added). "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." *Berger* v. *United States*, 295 U.S. 78, 89.

The trial proceedings were characterized by extraordinary and unusual developments and circumstances, highlighted by the mid-trial severance of the crucial defendant, and marked by serious errors in the application of substantive and procedural law, all working to the prejudice of petitioner. Even if it be deemed that any one of these issues may not in and of itself require reversal of petitioner's conviction when "singled out and standing alone," *Kotteakos* v. *United States*, 328 U.S. 750, 754, we submit that when these errors are taken together their cumulative effect is clearly such as to constitute a denial of due process of law.

> "* * * if one cannot say, with fair assurance after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos* v. *United States*, supra, at 765.

Where, as here, a criminal trial is had before a jury selected from a panel which has been restricted solely to the rural counties outlying the greater St. Louis Metropolitan area; before a jury on wh·h certain members concealed relevant facts bearing on their impartiality; under the impetus of an overzealous prosecutor who repeatedly transgressed the bounds of fair play; it seems plain that there has been a substantial miscarriage of justice. And this becomes all the more patent when to it is added the fact that the case was tried in an atmosphere heavily saturated with adverse pre-trial publicity engendered by the Government, and in a forum intrinsically burdensome to all defendants and far removed from the area where important defense witnesses were located.

And when in combination with the foregoing are added the final and conclusive circumstances that the evidence was at best tenuous, and that the final adjudication was made by a judge who had not presided at the trial and who had not—until the act of sentencing—ever laid eyes on the defendants, there is clearly presented a case with calls for the exercise of this Court's supervisory authority over the administration of criminal justice in the federal courts." *McNabb* v. *United States*, 318 U.S. 332, 341; *Offutt* v. *United States*, 348 U.S. 11, 13; *Calvaresi* v. *United States*, 348 U.S. 961.

For the foregoing reason, it is respectfully requested that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB M. LASHLY,
JOHN H. LASHLY,
PAUL B. RAVA,
St. Louis 1, Missouri,

ALAN Y. COLE,
815 Fifteenth Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioner.

LASHLY, LASHLY & MILLER,
St. Louis, Missouri,
Of Counsel.

January 23, 1958

APPENDIX A

Decision of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 15,746

MATTHEW J. CONNELLY and T. LAMAR CAUDLE, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 15, 1957.]

Before GARDNER, Chief Judge, and VOGEL and VAN OOSTERHOUT, Circuit Judges.

GARDNER, Chief Judge.

Appellants with one Harry I. Schwimmer were indicted under an indictment which charged them with conspiring to defraud the United States government in violation of Section 371, Title 18, U.S.C. The single-count indictment alleged that the purpose of the conspiracy was to defraud the United States of the proper administration of the Internal revenue laws and regulations, of the proper and faithful service of appellants Connelly and Caudle and to commit the offenses of bribery, perjury and knowingly making false statements and entries. The indictment named as co-conspirators but not as defendants Irving Sachs, Ellis N. Slack, Shu-Stiles, Inc., and divers other

persons to the grand jury unknown. At all times pertinent to the issues here involved appellant Matthew J. Connelly was Appointment Secretary to President Truman; appellant T. Lamar Caudle was an Assistant Attorney General in charge of the Tax Division of the Department of Justice; Harry I. Schwimmer was a Kansas City, Missouri, lawyer; Ellis N. Slack was an attorney in the Department of Justice; Irving Sachs was a St. Louis, Missouri, shoe broker, and Shu-Stiles, Inc. was a Missouri corporation of which Sachs was president. The indictment further charged that the purpose of the conspiracy was to protect Irving Sachs from criminal prosecution for Internal Revenue law violations.

After considerable testimony had been introduced by the government in support of the indictment Harry I. Schwimmer, named as a defendant, suffered a heart attack making it impossible for him to be present at the trial and thereupon a five day continuance was had. On proof that defendant Schwimmer could not, because of his heart condition, continue to be present at the trial or to participate therein the court declared a mistrial as to him whereupon appellants Connelly and Caudle moved for a mistrial as to themselves, which motions the court denied. At the close of the government's evidence in chief appellants moved for judgments of acquittal which motions were denied. The appellants then offered evidence in their defense and at the close of all the evidence they renewed their motions for judgments of acquittal. The Court announced that it would reserve ruling on these motions. At the close of all the evidence the court withdrew from the consideration of the jury the allegations of the indictment regarding the substantive offenses of bribery, perjury and knowingly making false statements and entries and then submitted the case to the jury on instructions to which no exceptions are here urged. The jury returned verdict of guilty as charged in the indictment and thereafter appellants interposed motions for judgment of acquittal notwithstanding

the verdict, or, in the alternative, for a new trial. They also renewed their motions for mistrial which had been denied at the time a mistrial was declared as to defendant Schwimmer. The court set these motions down for hearing thirty days from the date of filing. Twelve days before the date set for hearing Judge Hulen, who had heard the case, departed this life and thereafter and in due course Judge Gunnar H. Nordbye, United States District Judge for the District of Minnesota, was appointed as successor judge under Rule 25, Federal Rules of Criminal Procedure. Subsequent to the appointment of Judge Nordbye as successor judge appellants filed a supplemental motion for new trial on the ground of newly intervening facts, namely, the death of Judge Hulen, whereby appellants alleged they were deprived of the determination of pending motions by the trial judge, and on the ground of newly discovered evidence regarding the failure of some jurors to answer material questions propounded by the trial court upon voir dire examination. A hearing was had before Judge Nordbye on all pending motions December 18, 1956, and thereafter on February 11, 1957, all pending motions were overruled by him. Subsequent to the denial of these pending motions and on or about March 4, 1957, appellants filed a third supplemental motion for new trial on the ground of alleged newly discovered evidence. This too was denied by Judge Nordbye, following which the court pronounced sentence and entered judgment pursuant to the jury's verdict.

It is the contention of appellants that they were deprived of a fair trial by virtue of Judge Hulen's death after verdict was rendered and by the fact that a successor judge heard and denied their post-trial motions for judgment of acquittal and for a new trial. It is urged that the successor judge was not qualified to pass upon the pending motions, particularly their motions for judgment of acquittal notwithstanding the verdict or in the alterna-

tive for a new trial, because not having presided at the trial of the case he did not have the "feel of the case". Rule 25, Federal Rules of Criminal Procedure provides as follows:

> "If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

Judge Nordbye was assigned as successor judge in this case in strict compliance with this rule. Federal criminal law and procedure are dependent upon Federal statutes. Under this rule it was the duty of the successor judge, in the first instance at least in the exercise of a sound judicial discretion, to determine whether he could satisfactorily perform the duties of the judge who presided at the trial and whom he succeeded. It is to be observed that in the instant case while Judge Nordbye was assigned to perform the unfinished trial of this case on June 16, 1956, he did not hear the pending motions until some six months later and it is quite apparent from this record that in that time he thoroughly familiarized himself with the facts and satisfied himself that he could perform the duties to be performed by the presiding judge. Referring to this contention Judge Nordbye in the course of his opinion says:

> "• • • This Court is not unmindful that the observation made by the defendants as to the assigned Judge's being unable to have the 'feel of the case' is a matter that deserves careful consideration, and undoubtedly there is substance to defendants' position in this regard. On the other hand, this Court cannot escape the fact that this case has taken a long time to try,

the defendants were represented by experienced and skillful counsel, and the Judge who presided at the trial was recognized by all parties to have been not only an able and experienced trial judge, but one who presided with impeccable fairness and impartiality. Consequently, it would seem that, under these circumstances and after consideration of the entire record, I should not evade the responsibility which rests upon me by summarily granting a new trial, but rather to the best of my ability attempt to render definitive rulings on the various aspects of the motions presented."

There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character. As has been observed, the defendants here were charged with attempting to thwart the criminal prosecution of Irving Sachs for Internal Revenue law violations. The Internal Revenue agents on investigation reported that Sachs as president of Shu-Stiles, Inc. had fraudulently evaded taxes due the government by the company to the extent of $188,378.32. Criminal prosecution had been recommended by the agents of the Bureau of Internal Revenue and attorney Schwimmer was then employed to thwart this threatened criminal prosecution. The government's testimony tended to prove certain business transactions between Schwimmer and appellants by which the appellants profited, the payment of large sums of money by Sachs to Schwimmer, entries in books of Schwimmer indicating disbursement of sums of money on behalf of appellants, evidence that Schwimmer had purchased for appellant Connelly two suits of clothes, and evidence of

visits by Schwimmer to and consultations with the appellants at various times. This general characterization of this testimony indicates that it was in the nature of circumstantial evidence by the government furnishing the basis for inferences by the jury and it was not disputed by appellants but their testimony went to either their lack of knowledge or other explanations of the transactions proven by the government. In these circumstances there was not much to be gained by hearing the testimony of the witnesses and observing their demeanor that could not be gained by reading the testimony and we think Judge Nordbye did not abuse his judicial discretion when he determined, as he manifestly did, that he could perform the duties to be performed by the presiding judge after verdict. The law governing the situation here presented was strictly complied with and we think that law provided due process within the requirements of the Fifth Amendment. *Meldrum* v. *United States*, 9 Cir., 151 F. 177; *Chin Wah* v. *United States*, 2 Cir., 13 F.2d 530; *King* v. *United States*, 6 Cir., 25 F.2d 242; *Owens* v. *Hunter*, 10 Cir., 169 F.2d 971; *McIntyre* v. *Modern Woodmen of America*, 6 Cir., 200 F.1; *Pessagno* v. *Euclid Inv. Co.*, D.C.D.C., 35 F.Supp. 743; *United States* v. *Green*, S.D. Ill., 143 F.Supp. 442. In *Meldrum* v. *United States*, *supra*, the authority of a succeeding judge to pass upon a motion for a new trial in a federal criminal case tried before another judge who died while the motion was pending was expressly sustained. In the course of the opinion in that case it is said:

> "Did the judge of the court below have authority to pass upon the motion for a new trial and impose the sentence? The plaintiff in error contends that he did not, that he had not participated in the trial, and that the right of the plaintiff in error to have the judge who presided at his trial take part with the jury at every step in the determination of his guilt or innocence was a fundamental right which could not be taken away by an act of Congress, * * *.

"• • • Section 953 of the Revised Statutes as amended by Act June 5, 1900, c. 717, Sec. 1, 31 Stat. 270 (U.S. Comp. St. 1901, p. 696), provides that in case of the death of the judge before whom a cause has been tried the judge who succeeds him 'or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such case has been or is taken in stenographic notes • • • shall pass upon said motion and sign such bill of exceptions'; and it further provides that if said judge is satisfied that, owing to the fact that he did not preside at the trial or for any other cause, he cannot fairly pass upon said motion and allow and sign said bill of exceptions, he may in his discretion grant a new trial. If the succeeding judge can, as undoubtedly he may under this statute, deny a motion for a new trial, there can be no question of his power to further proceed in the case and render judgment upon the verdict."

We conclude that the contention that Judge Nordbye was disqualified to perform the duties to be performed by the presiding judge after verdict is without merit.

Appellants were subpoenaed as witnesses to testify before the grand jury and each of them did so testify. After the return of the indictment they moved to dismiss the indictment and suppress t testimony which they had given before the grand jury on the ground that they had not been advised that the prosecutor had decided at the time they testified to seek an indictment against them. Appellant Caudle was a lawyer with wide experience in criminal prosecutions on behalf of the government. Appellant Connelly was a man experienced in the investigating of fraud and criminal matters. He had been the chief investigator for a Senate committee investigating many fraudulent and criminal situations. The record definitely shows that each of the defendants was apprised of his constitutional rights. There was some doubt as to when the prosecutor had definitely decided to seek an indictment against them. After hearing testimony on the motion

Judge Hulen decided when the prosecutor had decided to seek indictments against them and he suppressed all testimony given by them before the grand jury after that date, but denied the motion to suppress testimony given by them before that date and also denied their motions to dismiss the indictment. The ruling of the court, we think, was eminently fair to appellants. We shall not encumber this opinion with a long recital of the warnings given and the circumstances thereof. It abundantly appears that they were advised and were at all times aware of their constitutional rights. We think the contention of appellants in this regard wholly without merit.

The trial of this case began May 7, 1956, and the jury returned a verdict June 14, 1956. After the case had been on trial for some sixteen days the defendant Schwimmer suffered a heart attack and as hereinbefore noted a mistrial was declared as to him. Thereupon appellants moved for a mistrial as to themselves on the ground that certain evidence admitted as to Schwimmer alone was of such a prejudicial nature that its effects could not be eradicated from the jury's mind by the court's instructions. Their motion was denied and the court instructed the jury that the testimony which the court identified, admitted as to Schwimmer alone, was withdrawn from the jury's consideration. In the course of its instruction on this question the court said:

> "Now, as to the testimony given by these two witnesses as I have referred to them as to these conversations with Schwimmer, I withdraw that testimony from your consideration. I have not gone into it in detail, but you will recall it. You are not to consider such testimony as evidence in this case of any character. Just forget that that testimony relating to the subject and at the times I have referred to was given in this case. Strike it from your minds entirely. It now has no bearing on the issues in this case and you will not consider it in any manner in arriving at

your decision as to the guilt or innocence of either of the defendants in this case.

"Does that cover the subject?"

The instruction was not excepted to. The testimony in no way implicated either of the other defendants on trial and we think the court's instruction proper, and we cannot presume that the jury disregarded it. *Blumenthal* v. *United States*, 332 U.S. 539; *Lutwak* v. *United States*, 344 U.S. 604; *Opper* v. *United States*, 348 U.S. 84; *Delli Paoli* v. *United States*, 352 U.S. 232. In *Blumenthal* v. *United States*, supra, two of the defendants had made admissions which the trial court admitted as to them only and in its instructions specifically limited such evidence as to them and told the jury to disregard such evidence in considering the guilt or innocence of the other three defendants. In the course of the opinion it is among other things said:

> "But the trial court's rulings, both upon admissibility and in the instructions, leave no room for doubt that the admissions were adequately excluded, insofar as this could be done in a joint trial, from consideration on the question of their guilt. The rulings told the jury plainly to disregard the admissions entirely, in every phase of the case, in determining that question. The direction was a total exclusion, not simply a partial one as the Government's argument seems to imply. The court might have been more emphatic. But we cannot say its unambiguous direction was inadequate. Nor can we assume that the jury misunderstood or disobeyed it."

In the very recent case of *Delli Paoli* v. *United States*, supra, the Supreme Court, reaffirming the doctrine of its prior decisions, said:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instruc-

tions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

The declaration of a mistrial as to the defendant Schwimmer removed him from the case and it is to be noted that prior to the trial appellants sought to remove him from the case by a motion for severance. This declaration of a mistrial as to Schwimmer as effectively removed him from the case as would the granting of appellants' motions for severance. But it seems to be argued that appellants were prejudiced, both by having Schwimmer tried jointly with them and by removing him by process of declaring a mistrial as to him. It is suggested that when Schwimmer was removed as a defendant they were deprived of his possible testimony on the assumption that he would have taken the stand in his own defense. This he might or might not have done and in this connection it is observed that he invoked the Fifth Amendment when he was called before the grand jury. Neither is there any assurance that had he taken the witness stand his testimony would have any tendency to exonerate appellants. Appellants' position after the severance of Schwimmer by the court's declaration of a mistrial as to him was no different than it would have been had he been named only as a co-conspirator. Even had Schwimmer been named as a co-conspirator only, his acts and declarations during the time of and in furtherance of the conspiracy would have been admissible against appellants. We think the removal of Schwimmer from the case was not prejudicial to appellants. *Carrado* v. *United States*, D.C., 210 F.2d 712; *Poliafico* v. *United States*, 6 Cir., 237 F.2d 97; *United States* v. *Beck*, 7 Cir.,

118 F.2d 178; *United States* v. *Karavias*, 7 Cir., 170 F.2d 968. The motion for mistrial as to the appellants because of the severance of Schwimmer by the court's declaration of mistrial as to him was under the circumstances here disclosed addressed to the sound judicial discretion of the trial judge and we think this discretion was wisely exercised in denying appellants' motions.

The court on its own motion entered an order directing that in selecting jurors for this case residents of the city and county of St. Louis be excluded from the list of prospective jurors, and the prospective jurors were accordingly selected from other parts of the district. Prior to the entry of this order the defendants had moved for a change of venue on the ground, among others, that they could not have a fair and impartial trial in the district because of the prejudicial publicity, editorial and otherwise, largely contained in the daily newspapers published in St. Louis and widely circulated and read, concerning alleged corruption of public officials in the Bureau of Internal Revenue and in the Department of Justice, and specifically relating to the method of handling income tax evasion cases in the Eastern District of Missouri, and the alleged corruption of public officials both in the District of Columbia and the Eastern District of Missouri. These motions were denied but the court then entered the above order, geographically excluding residents of the city and county of St. Louis. Section 1865(a), Title 28, U.S.C. provides:

> "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. * * *"

The order was in strict conformity with the statute and it did not eliminate any particular class but the jury

as drawn represented a cross section of the geographic unit designated and was manifestly selected from that part of the district which the judge thought to be most favorable to an impartial trial. The contention that the order resulted in a "rural" jury is without foundation in fact. As disclosed by their examination on voir dire for instance, six of the panel had lived in St. Louis or other large cities for some time. Many of the other jurors lived in large towns. Neither were the prospective jurors exclusively engaged in agricultural pursuits but included a wide range of professions, trades and occupations. The action of the trial judge followed a practice warranted by this statute. *Myers* v. *United States*, 8 Cir., 15 F.2d 977; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217; *Frazier* v. *United States*, 335 U.S. 497. In *Myers* v. *United States*, supra, it is said:

> "Plaintiff in error, defendant below, filed a motion to quash the jury panel because of the exclusion, in the drawing, of jurors from Douglas county, in which Omaha is situated; it being urged that the population of Douglas county formed a large percentage of that of the division of the district in which the offense was committed and tried. The order excluding these jurors was made pursuant to a long-standing practice of the court that, in drawing jurors, the county in which the crime was committed should be excluded.
>
> • • • • •
>
> "The motion to quash the panel was properly overruled. The law authorizes the court to draw the jury as was done in this case, and it is not required to assign a reason for so doing. The presumption is that it acted in the exercise of a sound discretion. If requested to assign a reason for the purpose of making a record for review, we think proper practice would require this to be done; but, in the absence of such request, we do not think the discretion can be challenged on that ground. The burden is upon the party who seeks to challenge the alleged arbitrary action, and in this case that burden has not been

successfully carried. *Spencer* v. *United States* (C.C.A. Eighth Circuit) 169 F. 562, 95 C.C.A. 60."

We must presume that it was the purpose of the trial judge to have the jury selected from such parts of the district as to be most favorable to an impartial trial.

After the trial had closed and the jury had returned a verdict finding appellants guilty, and a successor judge had been assigned to finish the trial of the case, appellants filed a motion for new trial on the ground of newly discovered evidence. In this motion it was alleged that two of the women jurors had concealed important facts relevant to their personal qualifications thereby impairing appellants' rights to intelligently exercise their challenges and depriving them of a fair and impartial trial. These two jurors were women. On voir dire the judge propounded among others the following questions:

> "Have any of you or the immediate members of your family, mother, father, brother, sister or husband or wife, or children, other than the gentleman who was sheriff, have you or any immediate members taken part in behalf of either political parties in political affairs such as a candidate for office or committee worker?
>
> "Do either of you or are any members of your family affiliated or hold membership or office — we have covered county committees, but sometimes there are Democratic or Republican organizations separate from the committee, and sometimes Democratic clubs or Republican clubs. To your knowledge, are you or any member of your family any members of such club or organizations? if so, raise your hand."

Neither of these women jurors answered either of these inquiries in the affirmative. In referring to this incident Judge Nordbye in his opinion says:

> "The evidence at the hearing on the motions for a new trial, which supplanted the affidavits previously obtained, indicate that these two jurors, to wit, Goldie

Brown and Grace Hoffman, were members of the Montgomery Township Republican Club in the years 1953, 1954 and 1955, but evidently from the testimony it would appear that they were not in 1956. Robert Hoffman, however, the son of Grace Hoffman, was treasurer of the committee or club in 1956. There is no showing here that Mrs. Hoffman knew that her son was treasurer of the local Republican Central Committee in 1956, and moreover, there is no showing that either of these jurors wilfully failed to answer truthfully the questions to which reference has been made. Furthermore, there is no showing that the defendants were prejudiced in any way by reason of any Republican affiliation or activities of either of these two jurors. This Court has no right to assume that in this trial jurors of Republican political affiliation would be prejudicial to these defendants and that jurors of Democratic affiliation would be prejudicial to the Government. And finally, the record is bereft of any showing that there was fraudulent conduct on the part of these jurors."

We are in entire accord with this ruling.

It is contended that the court erred in denying a change of venue or a continuance. The motions were addressed to the discretion of the court, *Finnegan* v. *United States*, 8 Cir., 204 F.2d 105; *Stroud* v. *United States*, 251 U.S. 15, and on careful review of the record we are convinced that there was no abuse of that discretion.

It is next contended that appellants' motion for judgment of acquittal or a new trial should have been granted because the evidence is as consistent with innocence as with guilt. In considering the question of the sufficiency of the evidence to go to the jury and to sustain the verdict we must view the evidence in a light most favorable to the prevailing party, in this case the government, and the prevailing party is entitled to all such favorable inferences as may reasonably be drawn from the facts and circumstances proven. If when so viewed, reasonable minds might reach different conclusions then the issue is

one of fact to be submitted to the jury and not one of law to be determined by the court. *Brennan* v. *United States*, 8 Cir., 240 F.2d 253; *Peters* v. *United States*, 8 Cir., 160 F.2d 319.

It appears without dispute that Irving Sachs was guilty of a wilful and flagrant tax fraud to which there was apparently no defense. As heretofore noted the agents of the Bureau of Internal Revenue had recommended prosecution. In this situation Harry I. Schwimmer, a lawyer of Kansas City, Missouri, was employed for the express purpose of thwarting this threatened criminal prosecution. His first ground for seeking relief was that Sachs had made voluntary disclosure. When it was shown that the so-called disclosure was not full and complete but was itself fraudulent Schwimmer abandoned that theory and sought to protect his client from criminal prosecution on the ground of ill health, claiming that his prosecution would probably result in his death. While it was shown that Sachs was an epileptic, the fact was not known to his own counsel, Shifrin, who had represented him for some twenty years, and even during the time the Department of Justice was considering the gravity of his malady he was able to look after his business in substantially his usual and normal manner. He was chief executive of Shu-Stiles, Inc., a substantial concern. At the government's request he was examined by Dr. Robert M. Bell, a consultant for the United States Public Health Service in neuropsychiatry. Dr. Bell reported that in his opinion any fatal outcome in the case of prosecution and trial of Sachs was "remote indeed". Schwimmer employed a number of doctors, none of whom made an examination of Sachs, but on the basis of reports and data submitted to them gave as their opinion that criminal prosecution of Sachs would constitute a clear and present danger to his health. Caudle disregarded the report of Dr. Bell; he also disregarded the recommendation of the Bureau of Internal Revenue and ordered

that Sachs be not criminally prosecuted but that the case be treated on the basis of civil liability. His action in disregarding the recommendation of the Bureau of Internal Revenue and in disregarding the report of a government doctor was unprecedented and did violence to the accepted practice of the Department. It appears from the evidence that Schwimmer made frequent calls on Caudle and Connelly. There is evidence of their frequent conversations and there is evidence of Caudle's and Connelly's continued activity and interest on behalf of Schwimmer's client. Schwimmer received in payment as compensation for his services in seeking to thwart the criminal prosecution of Sachs some $46,000, from which apparently he paid to each of the appellants or on their behalf substantial sums of money. There is also undisputed evidence that Schwimmer presented to Connelly two suits of clothes made to order.

As has heretofore been noted, the appellants, through Schwimmer, had certain business transactions in which they made substantial profits. The jury may well have inferred that these so-called business transactions were a mere cover-up for the fact that Schwimmer was compensating them for assisting him in thwarting the prosecution of a man confessedly guilty of defrauding the government. It is strenuously urged that the evidence was insufficient to prove that Connelly knowingly participated as a co-conspirator. It appears from the evidence that Connelly first called Charles Oliphant, Chief Counsel of the Bureau of Internal Revenue, in August of 1948, when Schwimmer had scheduled a conference with Oliphant, saying that Schwimmer had asked that "we call you and let you know we know him".

The case was referred to the Department of Justice August 12, 1949, after pending about four years in the Bureau of Internal Revenue where Schwimmer, with the assistance of Connelly, had secured its delay. Subsequent

to the transfer of the case to the Department of Justice Schwimmer obtained a further delay of one month. In September of 1949 Connelly then called Caudle and requested further postponement for his "friend" Harry I. Schwimmer. In response to this request Caudle relayed a message through Connelly to Schwimmer that Schwimmer could come in whenever he wanted but as soon as possible and that a postponement would be all right because the statute of limitations was not involved. A few days subsequent to this contact between Connelly and Caudle, Sachs paid $2,500 from Shu-Stiles, Inc. money to Schwimmer and on October 12, 1949, gave Schwimmer a check for $10,000, from which Schwimmer purchased an oil royalty for Connelly. The jury was warranted in believing that these expenditures by Schwimmer on behalf of Connelly were to reward him for his services in assisting to thwart the criminal prosecution of his client Sachs and there are other attending circumstances corroborating this conclusion. As pointed out by Judge Nordbye:

> "That Connelly knew and understood that Schwimmer's business with Caudle was an attempt to obtain a commitment from the Department of Justice that there would be no criminal prosecution in the Sachs case, seems evident from the conversation which Connelly had with Oliphant over the telephone on January 16, 1951. At that time Schwimmer already had obtained a letter from Caudle stating that there would be no criminal prosecution in the *Sachs* case, but notwithstanding he was attempting to obtain a similar letter of no-prosecution from the Bureau of Internal Revenue. In a conversation with Connelly over the telephone, Oliphant stated, 'You know Schwimmer on Sachs — does he just want to look good?' And Connelly replied, 'Wants to make sure not going to reverse justice again.' Certainly, this conversation would indicate that Connelly was aware of Schwimmer's plans to have both Departments committed on the Sachs case so that he need have no fear that the Bureau would render a ruling adverse to that which he obtained from the Justice Department. Moreover,

it must be apparent that Connelly knew that Schwimmer had obtained a no-prosecution letter from Caudle at that time. The friendly relations between Connelly and Schwimmer and the six or seven or more telephone calls to government officials made by Connelly with reference to the *Sachs* case fully warranted the jury in determining that Connelly's relation with the case that was pending in the Bureau of Internal Revenue and then in the Department of Justice was something more than mere routine telephone calls for the arranging of appointments."

The inferences to be drawn from all the surrounding circumstances connecting Connelly with the activity of Schwimmer warranted the jury in returning its verdict of guilty as to both appellants.

There was in evidence a document in Schwimmer's handwriting indicating that in connection with Schwimmer's attempt to thwart the criminal prosecution of his client, Schwimmer paid substantial sums to or on behalf of appellants. These circumstances, we think, warranted the jury in inferring that Schwimmer paid the appellants substantial sums of money for their assistance in attempting to thwart the criminal prosecution of his client. We conclude that the evidence, with the inferences that might reasonably be drawn therefrom by the jury, was substantial and that there was no error in denying appellants' motion for judgment of acquittal or for a new trial.

It is however contended that the court erred in admitting in evidence a document referred to in the evidence as Exhibit 100(j) which we have heretofore adverted to as a document in Schwimmer's own handwriting taken by the government from one of his account books. There was ample evidence to warrant the jury in finding, as it manifestly did, that the defendants Schwimmer, Connelly and Caudle had entered into a conspiracy as charged in the indictment. Any act or admission by either of the participants in the conspiracy occurring during its exist-

ence and in furtherance of its purposes was admissible as to all defendants. *Lutwak* v. *United States*, 344 U.S. 604; *Wiborg* v. *United States*, 163 U.S. 632; *Cwach* v. *United States*, 8 Cir., 212 F.2d 520; *Braatelien* v. *United States*, 8 Cir., 147 F.2d 888; *Harper* v. *United States*, 8 Cir., 143 F.2d 795. The exhibit contains the following:

	"Oct—49
"Loan $2,500 From I. Sachs	
"Shu-Stiles	$10,000
"Pd out Oil Royalty M. C.	4,200
"Held in Escrow to be paid out depending on whether I. Sachs case is dropped."	$ 5,800

As said by Judge Nordbye in considering the admissibility of this exhibit:

> "Government's Exhibit 100-j does not represent the entry of a mere narrative event, but it consists of an act of a conspirator who was handling the fund by and through which the conspiracy was to be accomplished. The entry consists of a recording of the receipt of the first anticipated disbursement thereof and the earmarking of the remaining funds for the purpose of carrying out the conspiracy. To earmark or allocate the remainder of a slush fund which has been created for the purpose of consummating an unlawful conspiracy would be an act in furtherance of such conspiracy."

We are in accord with Judge Nordbye's views. There was independent evidence that on October 12, 1949, co-conspirator Sachs, president of Shu-Stiles, Inc., gave Schwimmer a $10,000 check in addition to a prior payment of $2,500 on September 22, 1949, both of which are reflected in this exhibit. This testimony shows that these entries were made during the existence of the conspiracy. We think the exhibit was properly admitted as against both appellants.

There was admitted in evidence over the objection of appellants testimony of certain telephone conversations between Schwimmer and Oliphant, Caudle and Oliphant, and Connelly and Oliphant. These were based upon transcripts made by Oliphant's secretaries in the so-called Oliphant log which was a record kept in the regular course of Oliphant's official duties by Oliphant's secretaries. The sole objection to the admission of this evidence was that it violated the best evidence rule. The evidence shows that when a call would come in to the office over the official, as opposed to the private office telephone, of the Chief Counsel for his personal attention, the secretaries would listen in with earphones and transcribe the official content only as a routine matter in the regular course of their duties. The records made recorded the calls in full unless the call concerned only the making of an appointment, in which case they just recorded that fact in its essence. Although the objection was based solely on the ground that this evidence was violative of the best evidence rule it is now argued that the entries were not kept in the regular course of business, but were private entries. The practice of keeping these records of official calls and visits was a well established practice which had been followed not only by Mr. Oliphant but by his predecessor in office. This testimony was admissible, we think, under the Federal Business Records Act, Sec. 1733(a), Title 28, U.S.C.; *Finnegan* v. *United States*, supra; *Harper* v. *United States*, supra; *Holland* v. *United States*, 10 Cir., 209 F.2d 516; *Stegemann* v. *Miami Beach Boat Slips*, 5 Cir., 213 F.2d 561. The evidence conclusively showed that these records were made in the usual and systematic course of the business to which they had reference and they specifically referred to actions occurring at the time of their entry. We need not here enumerate the reasons for the rule making such entries admissible. They are too well established to require citation of authorities. There was no error in admitting this evidence, which incidently directly showed

Mr. Connelly's continued interest in the success of Mr. Schwimmer's undertaking to prevent the criminal prosecution of his client.

It is finally urged that the court erred in receiving evidence on rebuttal to the effect that appellant Connelly accepted gifts of clothing from Schwimmer. The evidence so received showed that Connelly received two suits worth $315.78 and a top coat worth $110 from Schwimmer. On cross-examination Connelly was repeatedly asked whether he had received any money, property, gifts or anything of value from Schwimmer during the time of the transactions here in question. He was quite evasive but finally answered that his wife might have received some flowers and he might have received some neckties. On further inquiry the witness said that he could not "recall" any others. He was then directly asked whether he had not received two suits of clothes "of a value over $300" which he then admitted receiving but that he could not recall when he received these gifts or whether he had received anything else of value from Schwimmer. On re-examination by his counsel the witness was asked to give the dates of the presents given him. In answer to this Connelly testified that in the past he had frequently received gifts from friends at the Christmas season. It appears from the cancelled checks produced that the gifts of two suits of clothes were given in the month of July, 1952. The government also showed that Connelly received a top coat in November or December of 1952. The testimony was admitted as to Connelly alone. We think it was clearly admissible on the question of the credibility of the witness and on the question of intent. No exception was saved by appellants to the instruction of the court so limiting this testimony. Acts done by a conspirator even after the termination of the conspiracy are properly admissible as having probative value as bearing on the intent and purpose of the conspirator in doing acts during the existence

of the conspiracy. Thus in *Lutwak* v. *United States*, 344 U.S. 604, it is said inter alia:

> "It does not necessarily follow that acts and declarations made after the conspiracy ended are not admissible. In this case, the essential fact of the conspiracy was the existence of phony marriage ceremonies entered into for the sole purpose of deceiving the immigration authorities and perpetrating a fraud upon the United States. *Acts* which took place after the conspiracy ended which were relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies were competent * * *."

It is now well established that evidence of acts or transactions not done in furtherance of the conspiracy may nevertheless be admitted if they tend to connect the conspirator with the conspiracy "by explaining his state of mind." *Glasser* v. *United States*, 315 U.S. 60. Neither is there any merit to the contention that this evidence was not admissible because it was offered in rebuttal. *Walder* v. *United States*, 347 U.S. 62. We conclude that there was no prejudicial error in admitting this testimony. We have given consideration to all the other contentions urged by appellants but think they are wholly without merit.

Appellants were represented at the trial of this case by skilled counsel of wide experience. The case has been well briefed on either side and ably argued. On the whole record we are convinced that the appellants had a fair trial and that there were no prejudicial errors committed by the trial court. The judgment appealed from is therefore affirmed.

A true copy.

Attest:

EUGENE C. FISHER
Acting Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)

APPENDIX B

Judgment of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15746 — September Term, 1957.

Friday, November 15, 1957.

MATTHEW J. CONNELLY and T. LAMAR CAUDLE, *Appellants*,

v.

UNITED STATES OF AMERICA.

Appeal from the United States District Court
for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgments and sentences of the said District Court, in this cause, be, and the same are hereby, affirmed.

And it is further Ordered by this Court that the defendants in the said District Court, Matthew J. Connelly and T. Lamar Caudle, do surrender themselves to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgments and sentences imposed upon them, and each of them, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

November 15th, 1957.

APPENDIX C

Decision of the District Court (Successor Judge)

The undersigned, on July 13, 1956, was assigned by Chief Judge Gardner, of the Eighth Circuit Court of Appeals, to the above-entitled action under Rule 25, Federal Rules of Criminal Procedure, by reason of the death of Judge Rubey M. Hulen, who presided at the trial of the defendants and before whom verdicts of guilty as charged in the indictment as to each of the defendants were returned by the jury impaneled therein. In said order of assignment, it is provided that the assigned Judge should "hear and determine all pertinent issues in said case and to perform all the necessary and appropriate duties to be performed to complete the trial of said action, with the same force and effect as if said acts and duties had been done and performed by * * * Rubey M. Hulen, now deceased, * * *."

There have been presented to me as such assigned Judge several motions of the defendants for judgment of acquittal, or in the alternative for a new trial, and supplemental motions for a new trial.

* * * * * * * * * *

The verdicts of the jury were returned on June 14, 1956. Thereafter, on June 19, 1956, defendants Connelly and Caudle made a joint motion for acquittal, or in the alternative for a new trial. On July 7, 1956, Judge Hulen passed away. Thereafter, a supplemental motion for a new trial upon the grounds of newly intervening facts and newly discovered evidence was filed on July 19, 1956. On August 2, 1956, in pursuance of an oral order of this Court, defendants were permitted, and did, file a second supplemental motion for a new trial on the grounds of newly discovered evidence. Briefs were thereafter filed and oral arguments were presented to this Court on December 18, 1956.

Defendants in their respective motions urged that at the time of Judge Hulen's death there were pending before him (a) separate motions for judgment of acquittal and for mistrial presented by these two defendants at the close of all the evidence in the case and as to which the court had reserved ruling; and (b) joint motion for judgment of acquittal or in the alternative for a new trial filed by these defendants on June 19, 1956, in which all motions theretofore filed by these defendants were asserted seriatim. At the outset, the defendants take the position that the consideration and determination of these motions is particularly within the province of the Judge who presided at the trial, who observed the witnesses, and who necessarily would have had the "feel of the case," as they expressed it, and which could not be imparted to one who merely reads the transcript and hears the arguments of counsel with respect to said motions. However, although Judge Hulen did not make a specific ruling upon defendant's motion for acquittal or for mistrial at the close of the case, it is evident that in effect he denied those motions by proceeding to present the matter to the jury. Any oversight in failing to make a formal ruling thereon cannot be considered as a reservation of ruling in light of the trial court's proceeding with the trial as the record reflects. This Court is not unmindful that the observation made by the defendants as to the assigned Judge's being unable to have the "feel of the case" is a matter that deserves careful consideration, and undoubtedly there is substance to defendants' position in this regard. On the other hand, this Court cannot escape the fact that this case has taken a long time to try, the defendants were represented by experienced and skillful counsel, and the Judge who presided at the trial was recognized by all parties to have been not only an able and experienced trial judge, but one who presided with impeccable fairness and impartiality. Consequently, it would seem that, under these

circumstances and after consideration of the entire record, I should not evade the responsibility which rests upon me by summarily granting a new trial, but rather to the best of my ability attempt to render definitive rulings on the various aspects of the motions presented. No doubt an appeal will be taken and the Appellate Court will have the same opportunity as this Court to determine whether or not Judge Hulen should have granted a judgment of acquittal, or whether or not, in the alternative, on the entire record, a new trial should be granted. It would seem to me, therefore, that a Judge assigned to sit under these circumstances should proceed with caution and extreme care before he assumes to find error in that which was done by the trial judge.

In view of Judge Hulen's apparent disposition of the motions for judgment of acquittal, I am not disposed to discuss that question. It seems reasonably clear that he assumed that there was sufficient evidence and facts established, and deductions and inferences from such facts by way of circumstantial evidence, which if believed would justify the jury in finding defendants guilty beyond a reasonable doubt, and in this view I concur.

The troublesome and substantial questions, however, which arise on these motions are to be found in the motions for a new trial. This case, as most criminal conspiracy cases, presents difficult problems of determining what declarations and acts of certain alleged conspirators are competent as against other defndants, as well as the other questions peculiar to this case, such as the effect of granting a mistrial to the defendant Schwimmer, the competency of Government's Exhibit 100-j, the alleged error in selecting jurors from a portion of the division to the exclusion of the remainder, as well as the other matters referred to by the defendants in their various motions. Counsel have presented seven primary questions with respect to their motions for a new trial without waiving any

other grounds which may have been urged. These seven primary questions will be considered by the Court in the same order as counsel have arranged them in their briefs, except that the questions as to the sufficiency of the evidence and the competency of Government's Exhibit 100-j will be considered under one sub-head.

I.

Manner of Drawing Jury Panel.

Section 1865 (a), Title 28, U. S. C. A., provides:

> "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense • • •."

By virtue of an order issued by Judge Hulen on April 3, 1956, he excluded from the list of prospective jurors the residents of the City of St. Louis and the County of St. Louis. As soon as this was discovered, counsel for the defendants called to the attention of the court that the population of the entire district, exclusive of St. Louis and St. Louis County, was 294,950 people, whereas the City of St. Louis and St. Louis County had a population of 1,263,145. The defendants took the position, therefore, that the jury panel did not consist of a representative jury, and contended that they were prejudiced by virtue of this situation. Their motion in this regard was overruled.

There had been a great deal of publicity regarding the pendency of the trial of these defendants in the Press and other news disseminating agencies. It is entirely reasonable to presume that Judge Hulen in entering his order of April 3, 1956, was motivated to do so because it was his view that to obtain a jury from the City and County of St. Louis would be exceedingly difficult, and that it would involve unnecessary expense. The immediate public

in the City of St. Louis would be more interested in the happenings in their local courts than the people outside the City. This would be due to the fact that Shu. Stiles and Irving Sachs were residents of the City of St. Louis. Many of the witnesses, including two of the local United States Judges, were residents of the City of St. Louis. In any event, Judge Hulen must have had good reasons for the order he issued. That is a reasonable presumption, and that presumption has in no way been overcome on this showing. True, people living outside the confines of the City of St. Louis have access to the radio, television and daily press substantially to the same extent as the so-called urban people. But nevertheless it seems clear that it would be far more difficult to obtain a jury from residents of the City and County of St. Louis than it would be from the suburban areas in the district. And defendants cannot urge that this was a suburban jury as such and that they were deprived of so-called urban jurors, because it appears that many of these jurors had spent substantial parts of their lives as residents of the City of St. Louis. But however one may attempt to rationalize the impact of publicity on urban jurors, as distinguished from so-called suburban jurors, the undeniable fact remains that the trial judge here in his discretion, in the interest of justice and economy, determined that the prospective jurors should be called from outside of the City and County of St. Louis. His order in that regard is entirely consistent with the statute. No prejudice is shown by reason of the exercise of such discretion and this Court should not presume to find that there was no reasonable basis for the exercise of such discretion, because on this showing there would be no basis for such finding. The burden rests upon the defendants to establish prejudice, and in this case that burden has not been sustained.

II.

The Alleged Failure of Jurors Brown and Hoffman to Disclose Their Political Affiliations on Voir Dire Examination.

Judge Hulen on voir dire examination propounded the following questions to prospective jurors:

> "Have any of you or the immediate members of your family, mother, father, brother, sister or husband or wife, or children, other than the gentleman who was sheriff, have you or any immediate members taken part in behalf of either political parties in political affairs such as a candidate for office or committee worker?" (R. 37).

After a few responses from certain jurors, the court stated, "Anyone else raise their hand?" Then later the following question was asked by the court of the jurors:

> "Do either of you or are any members of your family affiliated or hold membership or office—we have covered county committees, but sometimes there are Democratic or Republican organizations separate from the committee, and sometimes Democratic clubs or Republican clubs. To your knowledge, are you or any member of your family any members of such club or organizations? If so, raise your hand."

Neither juror Goldie Brown nor Grace Hoffman raised her hand in response to either question.

The evidence at the hearing on the motions for a new trial, which supplanted the affidavits previously obtained, indicate that these two jurors, to wit, Goldie Brown and Grace Hoffman, were members of the Montgomery Township Republican Club in the years 1953, 1954 and 1955, but evidently from the testimony it would appear that they were not in 1956. Robert Hoffman, however, the son of

Grace Hoffman, was treasurer of the committee or club in 1956. There is no showing here that Mrs. Hoffman knew that her son was treasurer of the local Republican Central Committee in 1956, and moreover, there is no showing that either of these jurors wilfully failed to answer truthfully the questions to which reference has been made. Furthermore, there is no showing that the defendants were prejudiced in any way by reason of any Republican affiliation or activities of either of these two jurors. This Court has no right to assume that in this trial jurors of Republican political affiliation would be prejudicial to these defendants and that jurors of Democratic affiliation would be prejudicial to the Government. And finally, the record is bereft of any showing that there was fraudulent conduct on the part of these jurors.

III.

THE ADMISSION OF CERTAIN TESTIMONY AS AGAINST THE DEFENDANT SCHWIMMER ONLY AND WHETHER ITS ALLEGED HARMFUL EFFECTS WERE ERADICATED FROM THE JURORS' MINDS BY INSTRUCTIONS BY THE COURT WITHDRAWING SUCH EVIDENCE.

A discussion of this ground for a new trial requires consideration of the motion for mistrial which was granted as to defendant Schwimmer because of his illness during the trial, and the case proceeded with the remaining defendants, Connelly and Caudle. It appears that the trial commenced on May 7, 1956. On May 23, 1956, the defendant Schwimmer became ill, requiring continuance until May 28th. On that date, after hearing certain medical testimony as to the nature of Schwimmer's illness and his inability to continue in the trial, counsel for Schwimmer made a motion for mistrial, which was granted by the court. Thereupon, attorneys for defendants Connelly and Caudle made a motion for mistrial on the ground that they were being deprived of a material

witness in Schwimmer, who was too ill to testify, either in court or by deposition. A motion for mistrial was also directed by reason of certain testimony admitted as to Schwimmer alone and not as to Connelly and Caudle, and there was, according to the defendants, no way that the effect of such testimony could be eradicated from the jurors' minds. The court denied both motions. The Government was, of course, in no way responsible for the unfortunate turn of events with respect to Schwimmer's health. Whether he would testify if called as a witness for the defendants, or claim his constitutional privilege, was a matter of sheer speculation. Moreover, there was no showing or even contention that a declaration of a mistrial as to Connelly and Caudle and the resumption of the trial at some later date would enable these defendants to procure Schwimmer's testimony. So far as this record discloses, Schwimmer never may be able to testify for the defendants even though he were so disposed. Under these circumstances, it would seem to be reasonably free from doubt that Judge Hulen's ruling requiring the remaining defendants to stand trial was correct. If Schwimmer had not been made a party to the conspiracy indictment, the defendants Connelly and Caudle could not complain, and if perchance he had passed away so that it would have been impossible for the Government to indict him, the defendants likewise could not contend that the Government had lost its right to proceed against them. The situation which now exists is not materially different. As indicated above, whether Schwimmer will ever be able to testify in court or by way of deposition is unknown, at least so far as the showing herein is concerned.

But defendants urge that a mistraial should be granted because of certain testimony which was admissible as to Schwimmer alone and admitted as to him alone by the court, and which they contend was highly prejudicial to them and that the court's direction to the jury to disregard such testimony did not and could not serve to

remove from the minds of the jurors the prejudicial effect thereof. The testimony in question which was received as to Schwimmer alone refers to certain conversation between him and one W. J. Dean, and also a telephone conversation between Schwimmer and attorney Sheffrey in March, 1956. A resume of that testimony can best be obtained from Judge Hulen's remarks to the jury when the jury was instructed to disregard it and to remove it from their minds:

> "Members of the jury, there is certain testimony which was given by two witnesses called by the government which I now will withdraw from your consideration. I will not describe that testimony by question and answer form, because that is not the way you recall it. I will describe it in substance because that is the way you are doubtless carrying it in your minds. I first want to refer to a conversation between defendant Schwimmer and W. J. Dean that took place on or about October 3, 1955. You will recall that Mr. Dean testified that he met defendant Schwimmer at the airport in Kansas City. Mr. Dean had preceded Mr. Schwimmer from Puerto Rico by only a short time. Mr. Dean was one of the officials of the Dean Rubber Company. Schwimmer had certain of his records physically stored at the Dean Rubber Company plant. These records were then subject to a subpoena duces tecum to be produced before a grand jury in St. Louis. In this conversation at the airport, according to the testimony of Mr. Dean, Schwimmer asked Mr. Dean if he could go to the Dean Rubber Company and get some records that he thought the government wanted. Mr. Dean objected to Schwimmer doing this; whereupon, by understanding between Schwimmer and Mr. Dean, one Joe Hoskins, who was a tax attorney for Mr. Dean, was called on the telephone and Schwimmer talked to him, and when he had finished, Schwimmer told Mr. Dean that

Mr. Hoskins had told him it was all right for him to go to the plant of the Dean Rubber Company and go through his records and pick out certain records that the government wanted and deliver them to the government attorney who then desired to have them. Now, I withdraw that testimony relating to that conversation from your consideration. That was testimony that Mr. Dean desired to talk to Mr. Hoskins over the telephone after Schwimmer had completed the conversation and that through some misunderstanding or other cause, Schwimmer hung up the telephone before Mr. Dean had a chance to talk to Mr. Hoskins. Mr. Dean testified he and Schwimmer went to the Dean Rubber Company and there Schwimmer went through certain of his records—how many the evidence does not show—which were stored in the Dean Rubber Company plant. That testimony I now withdraw from your consideration. Mr. Dean further testified that later on, or some time in January, 1955, Schwimmer and he had a further conversation and at that time Mr. Dean indicated to Schwimmer that Mr. Hoskins had not given him permission to go to the plant and go through the records that Schwimmer had stored there. All of that conversation I withdraw from your consideration in this case.

"There was testimony of two telephone conversations between Schwimmer and Mr. Sheffrey. You will recall that Mr. Sheffrey was the attorney in Kansas City who had been employed by Mr. Shifrin, the attorney in St. Louis, to represent Sachs before the Internal Revenue Department in the tax question. I am referring to the testimony given by Mr. Sheffrey as to a telephone conversation that took place between Mr. Sheffrey and the defendant Schwimmer. You will recall that Mr. Sheffrey said that the defendant Schwimmer called him twice, once from St. Louis

and once from New York City. In the conversation over the telephone from St. Louis, defendant Schwimmer wanted to know in detail what Mr. Sheffrey had testified to before the grand jury and Mr. Sheffrey testified that he undertook to tell Mr. Schwimmer what his testimony had been. That testimony of the conversation between Mr. Sheffrey and the defendant Schwimmer I now withdraw from your consideration in this case.

"Then a day or two later following the first conversation, according to the testimony of Mr. Sheffrey, in a conversation over the telephone from New York City, Schwimmer told Mr. Sheffrey, Mr. Schwimmer talking from New York City and Mr. Sheffrey being in Kansas City, that he was worried about the case, that is, the Sachs case, and the testimony that Mr. Sheffrey had given before the grand jury and that he was worried about himself and particularly what the Bar Association would do when they learned that Mr. Sheffrey was connected with the case during the time when certain action was taken in connection with it by Schwimmer.

"Now, as to the testimony given by these two witnesses as I have referred to them as to these conversations with Schwimmer, I withdraw that testimony from your consideration. I have not gone into it in detail, but you will recall it. You are not to consider such testimony as evidence in this case of any character. Just forget that that testimony relating to the subject and at the times I have referred to was given in this case. Strike it from your minds entirely. It now has no bearing on the issues in this case and you will not consider it in any manner in arriving at your decision as to the guilt or innocence of either of the defendants in this case.

"Does that cover the subject? Ready to start the argument?

"Mr. Newcomb: Yes.

"The Court: Very well. Proceed" (R. 2913-17).

It will be observed that no objection was made as to the language used by the court in striking this testimony from the record and in instructing the jury accordingly. My view is that there is an absence of any inflammatory or prejudicial inferences or deductions in the testimony stricken as to either Connelly or Caudle which was not fully removed by the court's admonition to the jury. Jurors are presumed to obey the instructions of the court. That presumption is the very basis of our entire jury system. True, there are instances where testimony is of such a highly inflammatory and harrowing character that it is reasoned that the harm that has been done by its reception cannot be eradicated by any instructions by the court. But such a situation does not exist here. This testimony was not erroneously admitted. It was properly admitted as to Schwimmer, who was then a party to this lawsuit. When the mistrial was granted as to Schwimmer, there arose this problem as to the striking of this testimony. The court concluded that an appropriate instruction to the jury as given would adequately remove any impact of that testimony to the prejudice of either of these defendants. Judge Hulen, to use defendants' expression, had the "feel of the case," and he must have concluded that defendants' rights were amply protected and safeguarded by the instructions which he gave. It does not seem that under such circumstances, therefore, this Court should rule to the contrary.

IV.

The Evidence in Rebuttal as to Gifts of Clothing to the Defendant Connelly from Schwimmer.

Connelly steadfastly maintained on direct examination that he never knew that the $750 oil royalty was a gift to him from Schwimmer and categorically denied that he ever intended that Schwimmer should ever make any gift to him of anything that had a substantial value, though he did admit on cross-examination that he had received two suits from Schwimmer of a value of about $300. On rebuttal the Government established that not only had Connelly received two suits from Schwimmer of the value indicated, but also a top coat valued at $110. Objection is made that such testimony should not have been received in rebuttal. Evidence indicating a close relationship between these parties and the nature of their relationship was competent evidence in a conspiracy case. In view of Connelly's testimony on direct and cross, it would seem that there is an absence of any substance to defendant's position that the Government was not permitted to offer in rebuttal the fact that Connelly had received gifts of substantial value from Schwimmer which tended not only to impeach Connelly's testimony, but tended to establish the true relationship between these parties and bore upon Connelly's intent in receiving the $750 gift in connection with the oil royalty.

V.

The Alleged Impropriety of Questions Propounded by Government Counsel to Defendant Caudle Regarding a $5,000 Check.

Both defendants urge error by reason of alleged misconduct of government counsel. The error pertains to certain questions asked of defendant Caudle in connection with a $5,000 check. It appears that when Caudle was

testifying on direct as to his conversation with Schwimmer about the latter's buying an oil interest for him, he emphasized that he told Schwimmer that he would not permit anyone to purchase any investments for him and that he would not engage in any business activity with any person until he was assured that the owner of the investment or that the contemplated business transaction in no way involved persons who were under investigation in the Department of Justice. In other words, he made it clear that he would make a careful examination in any business transaction he entered into so as to be assured that no taxpayer under investigation was involved. On cross-examination, the following appears in the record:

"Q. Mr. Caudle, you said yesterday that you would under no circumstances enter into any transaction involving a taxpayer, a representative of a taxpayer, without the most careful investigation. Do you remember that?

A. Yes, sir, I made that statement until I was perfectly satisfied the person whom I was buying anything from was not under any investigation. I gave my reasons yesterday.

Q. Did you know a man named Harry Knohl?

A. Yes, sir.

Q. Did you know him to be a representative of two taxpayers, named Fretus and Orrin?

A. I knew Harry Knohl was a friend of Mr. Fretus and Mr. Orrin.

Q. Mr. Knohl had conferred with you and others in connection with the Fretus and Orrin case?

A. One time he came over with his two friends whom I indicted.

Q. And you knew there was a pending tax case known as—

A. Yes, they were indicted in 1949 under my jurisdiction, as I remember it.

Q. Mr. Caudle, I show you an original check for $5,000, and I ask you—

Mr. Margiotti: I am objecting to that question and ask the court to rule on it first.

The Court: He has opened it up by his direct examination and also by his cross-examination.

Mr. Margiotti: If the court rules, that is all I am asking for.

The Court: Overruled.

Q. (By Mr. Newcomb) I show you a check for $5,000 and ask you if it is a check made out to you?

A. Yes, sir.

Q. Does it bear your endorsement?

A. Yes, sir.

Q. I will ask that it be marked for identification only at this time—Government's Exhibit 182.

(Which said document was so marked for identification as Government's Exhibit 182.)

Q. (By Mr. Newcomb) Mr. Caudle, I will call your attention to the fact the date of the check is September 18, 1950, and I will ask you whether the maker of the check, a Mr. Stonnell, was a friend and acquaintance of yours?

A. Yes, sir, he was a warm friend.

Q. You have answered the question.

Mr. Margiotti: May the record show this line of cross-examination is over our objection on the grounds it is a collateral matter and not charged in the indictment and raises an issue which is not involved in this case?

(Whereupon, a discussion was had off the record and out of the hearing of the jury.)

The Court: Objection sustained.

Mr. Margiotti: May we ask the court at this time to instruct the jury to disregard the testimony just given?

The Court: I don't think there is an answer to the question. As a matter of fact, I don't think he finished the question'' (R. 2744-46).

Apparently the court assumed that the proposed inquiry was leading into a wholly collateral matter. Government counsel contended that proof would develop that, contrary to his protestations in his direct testimony, Caudle did do business with representatives of taxpayers. In any event, the court after hearing apparently that which constituted an informal unrecorded offer of proof, sustained the objection to the Government's proceeding any further with that line of inquiry.

On redirect examination by Caudle's counsel, reference was made to a certain oil interest in which Caudle was interested, which was referred to as the Fletcher interest, and Caudle was asked by his counsel whether his connection with that interest was compatible with his position as a United States official. Thereupon, government counsel stated to defendant's counsel before the jury that if he proceeded with that question, he would go into the $5,000 check transaction. In that the court on the Government's cross-examination had concluded that the $5,000 check transaction was a collateral matter, there probably was no excuse for government counsel's making any reference to it during the redirect examination. However, no motion to strike counsel's remark was made at that time, but later a motion for a mistrial was made on the ground of prejudicial conduct engaged in by government counsel. A colloquy occurred between court and counsel at which time government counsel contended that he had acted in good faith in referring to the $5,000 check in view of Caudle's testimony on direct, but he did recognize that, in his interruption of the redirect examination in the manner indicated and in again referring to the $5,000 check, he had acted hastily and he offered his apology. Judge Hulen, in overruling the motion for a mistrial, made this observation:

"It oughtn't have been injected in the case in any manner and it is regrettable that it was, but I don't believe that it is prejudicial to the jury and I don't think the jury has gotten any idea of what counsel were talking about and the conversation and remarks that passed between counsel about it. As a matter of fact, I just have a hazy recollection about it, myself, and I don't believe the jury got any idea about that check involving any collateral wrongdoing that counsel for the government was about to inquire into.

Mr. Margiotti: It was the attitude used by him when he got up and said, 'If you are going to go into that, I want to go into the $5,000.00 check,' and I hadn't asked Mr. Caudle any question to open the door, because I know how to try a case and wouldn't ask a question of that type.

Mr. Newcomb: Your Honor, the question was whether the Fletcher oil transaction—whether the Fletcher oil transaction was compatible with his position. Your Honor had excluded any of this other thing and then Mr. Margiotti was going to, I felt, improperly go into it and for the remark I apologize quite sincerely.

The Court: Well, I am going to overrule the motion. I am sorry the matter is in the case, but it is hard to try a case this long without something happening that is not in exact accord wth the proper direction of the case. I think we have had very few of those in this case so far, so the motion will be overruled" (R. 2875-76).

It would seem that Judge Hulen's appraisal of the entire situation is the basis upon which this Court should proceed in determining whether any prejudice resulted to either defendant in the minds of the jury from these events which took place during the trial, and whether by reason thereof Judge Hulen erred in not granting a mistrial. He

overruled the motion, and I see no reason why I should assume that under all the circumstances the presiding judge was in error in that regard.

VI.

(a) Sufficiency of the Evidence to Sustain Conviction.

(b) Competency of Government's Exhibit 100-j.

(a) In considering the question as to whether there has been a miscarriage of justice and whether there is sufficient evidence to sustain the verdicts of conviction, I have examined and re-examined the record herein with considerable care and a great deal of reflection. Obviously, there are some facts as to which there is no real dispute in the record: (1) Irving Sachs was guilty of a wilful and flagrant tax fraud to which there was no defense; the contentions regarding voluntary disclosure or promise of immunity from prosecution were without any real substance; and (2) Schwimmer was retained as attorney for Sachs because of his acquaintances and presumed prestige in Washington circles. He was not a tax lawyer. He entered the case when it was on the Kansas City level and before it had been sent to Washington, to allay any suspicion that he had been brought in to the case because of his entre to Washington political circles. (3) No mention was made of Sachs' health as a matter of any concern in the discussions of this tax case by Sheffrey or Shifrin or Schwimmer with local tax agents in Kansas City or Chicago. (4) When Schwimmer had his first conference with Oliphant in the Bureau of Internal Revenue in August, 1948, he made no mention of Sachs' health as a material factor in determining whether or not criminal prosecution should be instituted. (5) The first time the condition of Sachs' health was mentioned was when Schwimmer discussed the case with defendant Caudle in October, 1949, and at that time the Bureau of Internal Revenue had for-

warded the case to the Department of Justice after about a year's delay, with a recommendation for prosecution.

There is no question that Irving Sachs was suffering from epilepsy, but in that connection it is significant that his own lawyer, Mr. Shifrin, who had represented him for some twenty years, did not know that he was suffering from that ailment. Moreover, it is an admitted fact that during the period when the Department of Justice was considering the gravity of his malady, he was able to look after his business in substantially his usual and normal manner. He was the chief executive of a substantial concern. The only personal physical examination to which he had been subjected for the Government was made by Dr. Bell of St. Louis, a consultant for the United States Public Health Service in neuropsychiatry in the United States Marine Hospital at Kirkwood, Missouri. He made a report to Caudle as the result of his examination and stated that in his opinion any fatal outcome in the case of prosecution and trial of Sachs was "remote indeed." Thereafter, Sachs refused to be examined by any government doctor, presumably upon the alleged grounds that he was unable to undergo the ordeal of such examination. In any event, he was examined repeatedly by doctors obtained by his counsel, and it seems evident that the jury, in light of all the evidence, had a right to find that Caudle was determined that Sachs should not be prosecuted, regardless of Dr. Bell's views and regardless of the first recommendation of the subordinates in his own office, and regardless of the repeated request for permission to present Sachs' case to the grand jury by Drake Watson, the United States Attorney at St. Louis. There is abundant evidence to indicate that Caudle was determined to build up a medical history, diagnosis, and opinions as to Sachs' health weighted in behalf of the defendant, which would assume to furnish substantial proof that this prospective defendant was one who was entitled to the protection of the so-called health policy of the Department. He paid but scant attention to

the generally recognized principle that a decision not to prosecute by reason of the health of the taxpayer required a certificate by a competent doctor who had examined the taxpayer at the Government's request, certifying that trial and prosecution would constitute a clear and present danger to the prospective defendant's health.

The very formidable array of medical men who examined Sachs and who predicted such dire results if Sachs were prosecuted are not necessarily to be considered as conspirators or men who corruptly made a false diagnosis. They were medical men hired by Sachs' lawyers for the purpose of enabling him to escape a criminal prosecution. The Government, for reasons known only to Caudle, was deprived of any voice in determining Sachs' true condition except as reflected in Dr. Bell's report. As indicative of Caudle's unusual interest in protecting the interests of a taxpayer who was guilty of a flagrant fraud, reference may be made to a conversation that he had with Mr. Oliphant of the Bureau of Internal Revenue in January, 1950, when he inquired of Oliphant about the plan that should be followed in arranging for medical examination. Apparently he was under the impression that the Penal Division of the Bureau of Internal Revenue would select a public health doctor, but he stated to Oliphant that "the lawyer was afraid they might pick one prejudiced by the agent." In any event, it seems clear that after having received Dr. Bell's report, Caudle worked hand in hand with Schwimmer in arranging for the production of a medical record relating to Sachs which would furnish him grounds to deny prosecution.

The defense emphasizes the report of the panel of doctors from St. Elizabeth Hospital, Washington, D. C., as persuasive proof that Caudle was attempting to obtain the unbiased report of an unprejudiced group of doctors. However, it must be remembered that all of the medical data outside of Dr. Bell's report were arranged, compiled, and

obtained at the behest of Sachs' lawyers. Although Dr. Bell's report was included, the doctors at St. Elizabeth Hospital had before them the vastly more complete and detailed medical history assembled by Sachs' lawyers, the opinions of doctors hired by Sachs' lawyers, who expressed their conclusions as to Sachs' health and the effect that a trial and prosecution would have thereon. The opinion of the St. Elizabeth Hospital panel was predicated solely upon the basis of the written data which was submitted to them by Caudle. They never had examined or seen Sachs. And it is not without significance that Dr. Cruvant of the St. Elizabeth panel was a friend of one of the doctors engaged by Sachs and had discussed the case with that doctor before the report of the St. Elizabeth Hospital panel was issued.

Drake Watson, United States Attorney at St. Louis, wrote Caudle regarding the delay in the prosecution of the Sachs case on September 1, 1949, December 7, 1949, December 20, 1949, and January 20, 1950. Mr. Cunningham, one of Caudle's top assistants in the Department of Justice, notwithstanding the medical data assembled by Schwimmer, recommended prosecution at least three times during the year 1950. And although deputies Rothwacks and Smith in the Department of Justice finally agreed with Caudle that the medical data justified a non-prosecution ruling as to the Sachs case, the fact that they were Caudle's subordinates and finally acquiesced in his conclusions is of no great significance. Each of these subordinates had previously recommended prosecution. And indeed, it is singular that Caudle should attempt to fortify his own position by attempting to obtain Oliphant's views regarding prosecution in the Sachs case. However, in this he was not successful in that, after a delay of some three months, Oliphant stated on September 7, 1950, that in his opinion the views of the government-appointed physician, Dr. Bell, were controlling.

Reference is made to personal experiences that Caudle had as a young man with schoolmates who were afflicted with epilepsy and the harrowing experiences that he had in observing the manifestations of convulsions and seizures which he contends caused him to be overly sympathetic with anyone who had to be subjected to epilepsy which was approaching the grand mal type. He also contends that, as evidence of his good faith in assuming that Sachs could not stand trial without endangering his life, the opinion was expressed by Judge Harper, who sentenced Sachs, that if it were not for Sachs' epileptic condition, he would have sent him to prison instead of imposing a fine, and Caudle urges that Judge Harper had substantially the same medical data before him as was available to the Department of Justice. He urges, therefore, that he cannot be charged with bad faith in placing credence in this medical data when Judge Harper found it reliable. However, whatever Judge Harper may have concluded regarding Sachs' health, it is quite evident that he did not conclude that Sachs should escape prosecution or be freed from any criminal conviction because he was epileptic. To the extent that Judge Harper may have known in what way the medical data was obtained does not appear in the record. In any event, Sachs was indicted, pleaded guilty, and was sentenced, regardless of all the dark forebodings as to what would happen if he were indicted and prosecuted. Here we have a man who was going about his business in the usual and normal manner during all of this period, and two days before he was sentenced by Judge Harper he was in the City of Chicago attending a convention of shoe manufacturers. It is difficult to understand the attitude of the Tax Division of the Department of Justice when it referred to the prosecution and trial of Sachs as being the factor which might have a fatal result. Of course, the fact is that Sachs had no defense. There was nothing to try, which was quite evident when he finally was indicted and entered his plea of guilty. The unyielding determination

of Caudle to save Sachs from prosecution in light of al the circumstances disclosed by the evidence fully justifie the jury in finding that he was proceeding in this tax cas bent upon saving this taxpayer from any criminal prosecu tion. Whether he acted corruptly was a jury question. That issue was made clear to the jury when the cour stated:

"The defendant Caudle during the period involve in the indictment referred to in this case was Assis ant Attorney General of the United States in charg of the Tax Department in the Attorney General's offic As such it was his duty to determine whether o not the taxpayer Sachs should be criminally pros cuted and if prosecuted whether the then existin health policy of the Department of Justice should b applied in view of the claimed physical and menta condition of said Sachs. If you find that in renderin decisions and in actions taken on matters applicab to the Sachs tax case, Caudle exercised that dut honestly and not as a part of the conspiracy charge then you are instructed that it is your duty to rende a verdict of not guilty as to defendant Caudle, even it later developed that he may have been mistaken i the exercise of his judgment.

"While one may become a party to or member of conspiracy without full knowledge of all details thereo or means to be used by conspirators, a person havin no knowledge of conspiracy, but acting in a wa which furthers an object thereof, does not become conspirator, as some wilful participation by him i the conspiracy with intent to further common purpos or design must be shown to establish his guilt of con spiracy. Therefore, if the jury should find that ther was a conspiracy existing among others than defen ant Caudle before the Sachs tax case was referred t the Department of Justice and that Caudle had n

knowledge of such conspiracy, his subsequent acts, even though in furtherance thereof, did not make him a conspirator unless his acts involved participation in such conspiracy with knowledge thereof and with wilful intent to further the purpose of such conspiracy" (R. 3151-52).

And of course the fact that Sachs was ultimately indicted and sentenced is no defense here. The conspiracy in order to be illegal did not have to be successful.

It was some time before August 4, 1950, that Caudle stated he had a telephone call from Schwimmer in which the latter informed him that he had bought two small oil interests, one for himself for $750 and one for Caudle in the same amount. Caudle then states in his testimony that when he heard that from Schwimmer over the telephone,

"* * * I absolutely was shocked and cut him to ribbons for having bought something without me knowing about it. He paid for it without me knowing about it and took the deed in my name without me knowing about it, somewhere in Oklahoma, and I gave Harry Schwimmer one of the hardest, roughest dressings-down he ever got from any man, I reckon, but he got a tongue-lashing from me. I used such strong language I know I apologized to Mrs. Caudle when I finally put the receiver down.

Q Can you tell me about when that was—I am going to show you Plaintiff's Exhibit 100, being a letter from Harry Schwimmer to you. I want you to look at it. It is addressed to you at your home; it is a special delivery letter, stamped Kansas City, August 4th—Washington, D. C., August 5, 1950.

A Yes, sir.

Q Will you look at it?

A Yes, sir.

Q At the time he talked to you had you received that letter?

A. No, sir; I don't think I had.

Q. How soon after your conversation did you receive that letter?

A. It was a day or so later, as I remember. He called me back. Harry Schwimmer, after this first conversation, and he told me that he wouldn't injure me and that he was going to correct it, and I demanded that night, I said, 'I want you to prepare a deed for Mrs. Caudle and I to sign to take this out of our names, whatever this thing is in Oklahoma, this title you put there,' and he told me he would before the conversation was over on the telephone. And I don't know whether it was in that same conversation —I do not think that it was, because it has been so long ago, and I think that Schwimmer, after this first call to me, of saying he had bought this and put it in my name, and asking me to send him a check for it, when he got—he called me and said would I sign a temporary transfer order to stop the little checks going to the people who used to have it, that would give him time enough to prepare a deed for us to sign, that he would prepare, so that we could get this title out of our name, and I told him I didn't want to do it. He said, 'I can't do it; the title is in your name,' but I said, 'You put it in my name.' Finally I told him I would sign the transfer order, but I would not sign a check until he had prepared a deed for me and my wife to sign to get this thing out of our name, in Oklahoma, that he had put there" (R. 2671-73).

It will be observed that after the telephone call from Schwimmer to which Caudle referred, and at which time he contends he gave Schwimmer such a tongue-lashing because the oil transaction had been entered into without notice, knowledge, or consent, it appears that a letter, Government's Exhibit 106, was written by Schwimmer to Caudle. This letter reads:

"August 4, 1950

"T. L. Caudle
2939 Newark N. W.
Washington, D. C.

Dear Lamarr:

Enclosed please find transfer order on your share of the royalty we have purchased. On the back of the order there is a place for you to sign above the space designated 'Buyer sign here.' Have someone witness your signature or I will witness it and return this order promptly to me so I can complete the transaction.

I shall forward the deeds to the Clerk of the County Court of Logan County at Guthrie and as soon as the original deed is returned I will send a copy to Sinclair Prairie and forward the original deed to you, of course. This royalty should pay close to $50.00 a month for a good number of years and it is an excellent investment.

Kindest personal regards.

Sincerely,

Harry I. Schwimmer."

And on September 6, 1950, Caudle wrote to Schwimmer, the copy, Government's Exhibit 144, reading as follows:

"September 6, 1950

"Dear Harry:

I enjoyed seeing you very much the other day and am sorry that I couldn't be with you longer.

Bob Fletcher never got to New York. He called me yesterday from Reading, Pennsylvania, and said how sorry he was that he didn't get to see you. He said your letter had been received at his office. He told me that he would contact you on his return to Dallas, and would be back there this weekend.

He is a mighty fine fellow to know and I want you to meet him. I told him all about you and he is anxious to meet you. If I hear of any good investments along that line I will let you know. I would suggest that you tie on to the Harvey Tract when you get the information that answers the questions that you would like to ask him.

Come back to see us again when you can.

Good luck and best wishes always to you.

Sincerely your friend,

Mr. Harry Schwimmer
Attorney at Law
1260 Dierks Building
Kansas City, Mo."

And on September 8, 1950, Schwimmer wrote to Caudle, Government's Exhibit 107, as follows:

"September 8, 1950

"Mr. T. L. Caudle
2939 Newark N. W.
Washington, D. C.

Dear Lamar:

Your good letter of the 6th received. Glad to hear from you. I tried to contact Fletcher in New York but couldn't and I now know why. I hope I have a chance to meet him on his return trip to Dallas.

You remember I talked to you about the Knapp-Monarch Co. of St. Louis, Missouri, whom I have represented for a long time. In the last war they did a large amount of work for the Government manufacturing hand-grenades and parts for the Grand rifle. I would like very much to be able to get some Government contracts for them.

Their main business in [sic] the manufacturing and developing of electrical devices and electrical appliances.

I am sending you under separate cover a financial statement for last year which also has a picture of their St. Louis plant.

I will have the letter from the doctor for you next week. It was swell seeing you while in Washington. Hope I will see you again soon.

Fondest Regards,

Harry

Harry I. Schwimmer."

Obviously, the writing of these letters and the very friendly relationship which they evidence are wholly inconsistent with any breach of relationship between the parties which Caudle contends took place when he received the telephone call some time prior to August 4, 1950, and the undisputed fact remains that, in accordance with Schwimmer's request in his letter of August 4th, Caudle did sign the transfer order, although he contends that he signed this document solely to avoid the royalty checks going to parties who had already parted with the title. But the subsequent conduct of the parties strongly suggests that the vehement protestations claimed to have been made by Caudle were at least highly exaggerated. It is true that, although he endorsed the first three royalty checks, they were returned to Schwimmer and there is no evidence that Caudle ever received any of the proceeds of the three checks that he did endorse. However, Schwimmer utilized the proceeds of these three checks for the purpose of purchasing a cashier's check payable to himself, which he did not cash for over a year. Caudle contends that during all of this time he was repeatedly asking Schwimmer to obtain for him a deed that he and Mrs. Caudle could sign so as to divest themselves of this oil property. The deed, however, was not forthcoming for the Caudles to sign. The long delay in regard thereto is inexplicable unless it was in accord with the wishes of the parties concerned.

It was on January 11, 1951, that Caudle formally by letter informed Schwimmer that prosecution would be declined in the Sachs case. On the next day, Schwimmer obtained another check for $10,000 from Irving Sachs. In March, 1951, Caudle had not received the necessary papers from Schwimmer to divest himself from the oil royalty title, and at that time he contends that he was in Miami, Florida, and learned that Schwimmer was there. He contends that he conferred with him and again insisted upon getting the blank form of deed from him so that he and Mrs. Caudle could sign it. Schwimmer's excuse for the delay was his illness. It was on this occasion that Caudle endorsed one of the royalty checks totaling something over $60. But he contends that the check was dated December 15, 1950, and would be void if not cashed in three months, and that as a favor to Schwimmer he cashed the check, advancing him the amount thereof and then deposited the check in his own bank account in Washington. It was not until April 16, 1951, after the indictment of Sachs and after the Senate Committee had heard some evidence as to the alleged mishandling of the Sachs case by Caudle, that Schwimmer forwarded the deed to Caudle. On April 19, 1951, Caudle sent the executed deed to Schwimmer with a letter stating that this was being done "to cover the error that was made in this matter."

It was on February 12, 1951, that Drake Watson, United States Attorney, wrote Caudle that he was once more proposing a grand jury investigation of Internal Revenue matters in the Eastern District of Missouri. It was apparent that Judge Moore of that district had requested Watson's assistance. In reply Caudle wired [Government's Exhibit 116(c)]:

> "Reurlet February Twelve Nineteen Fiftyone Concerning Communication From Citizen to Judge Respecting Several Cases of Possible Income Tax Evasion Stop Matter Under Consideration Here Stop Do Not

Present Any Cases to Grand Jury Unless Specifically Authorized by This Office Stop Will Write Soon.

Theron L. Caudle,
Assistant Attorney General."

When, however, a Deputy Attorney General of the United States gave Watson clearance for such investigation notwithstanding Caudle's telegram, the latter telephoned Schwimmer in Kansas City on February 28, 1951, that Watson was going to present the Sachs case to the grand jury. The indictment against Sachs was returned on or about March 1, 1951. He entered a plea of guilty that Fall. Weiffenbach, the probation officer at St. Louis, was ordered to make a presentence investigation and wrote to Caudle on September 13, 1951, for information regarding the medical reports in the Sachs case and asked for Caudle's views. It is to be gathered from the record that this letter did not go to Caudle personally as the answer was signed by one Fred G. Folsom, who apparently was acting as "Section Chief." The letter stated that it was not the practice of the Department to make recommendations with respect to sentence, but it did state that, if recommendation was requested by the court, it was the policy of the Department to recommend a substantial fine and a jail sentence. When Caudle learned of this letter, he telephoned to Weiffenbach and stated that the letter had been sent without his knowledge and approval. He ordered Folsom to prepare another letter, and in this letter he was very emphatic that Sachs should not be sent to prison, and further stated that in his opinion Sachs never should have been indicted. A consideration of the entire record as to Caudle's complicity in the conspiracy charged leaves no doubt as to the sufficiency of the evidence to sustain the jury's determination of guilty as alleged in the indictment.

The sufficiency of the evidence as to Connelly is undoubtedly more troublesome and presents questions closer

than those which arise in considering the evidence relating to the defendant Caudle. But analysis of the evidence which the jury had a right to consider and the reasonable inferences to be deduced therefrom presents a picture which was sufficient to convince a reasonable person beyond a reasonable doubt of his guilt. Connelly contends that he became enmeshed in a web through the machinations of Schwimmer in a situation where he did not know Sachs, had no intention of corruptly influencing any tax official, that out of deference to Schwimmer's standing with Tom Evans, a friend of President Truman and the Administration, his telephonic appointment conversations with Oliphant or Caudle were made without an intention or knowledge that he was instrumental in causing any official of the United States corruptly to evade his sworn duty to his Government, if that be the fact. Connelly's position in this regard was carefully outlined to the jury when the court stated in its instructions:

> "Even though you may believe and find from the evidence and beyond a reasonable doubt that Schwimmer and Sachs, and/or other persons, entered into a conspiracy to defraud the United States of its right to the conscientious and unbiased judgment and actions of defendant Connelly as Appointment Secretary to the President of the United States, with regard to the processing of the Sachs, Shu-Stiles case, and even though you may believe and find that in pursuance of such conspiracy said parties or any of them attempted to unduly influence defendant Connelly, and to draw him into the accomplishment of their plans and even though you may further find and believe that defendant Connelly did arrange appointments and lend other assistance as shown in the evidence which tended to facilitate their course and to further the aims and purposes of their conspiracy, nevertheless you must acquit defendant Connelly unless you are satisfied by the evidence in this beyond a reasonable doubt that

defendant Connelly had knowledge and was conscious of the unlawful and felonious aims and purposes of said conspiracy and with that knowledge and understanding purposely entered upon the furtherance thereof" (R. 3146-47).

It seems obvious, however, that Schwimmer's first introduction into the Sachs case was for the purpose of informing the Bureau of Internal Revenue office that he was a person of sufficient importance to have the President's Appointment Secretary pave the way for a favorable hearing. That is evident when Schwimmer already had made an appointment with Oliphant. It was not necessary for Connelly to arrange any appointment. However, on August 10, 1948, he telephoned Oliphant stating, "I understand Harry Schwimmer of St. Louis has a conference this afternoon. He asked me to call you and let you know we know him." Then in September, 1948, when Schwimmer called Oliphant, he, Schwimmer, stated, "Matt thought it would be a good idea to see if there is anything new in regard to Shu-Stiles." Although Government's Exhibit 54-f, which contains this conversation, was received in evidence solely as to Schwimmer, nevertheless the jury had a right to consider it if a prima facie case had been made out by other evidence of Connelly's complicity in the conspiracy. Clearly, it was an act by Schwimmer in furtherance of, and made during, the conspiracy. That Connelly knew and understood that Schwimmer's business with Caudle was an attempt to obtain a commitment from the Department of Justice that there would be no criminal prosecution in the Sachs case, seems evidence from the conversation which Connelly had with Oliphant over the telephone on January 16, 1951. At that time Schwimmer already had obtained a letter from Caudle stating that there would be no criminal prosecution in the Sachs case, but notwithstanding he was attempting to obtain a similar letter of no-prosecution from the Bureau of Internal Reve-

nue. In a conversation with Connelly over the telephone, Oliphant stated, "You know Schwimmer on Sachs—does he just want to look good? And Connelly replied, "Wants to make sure not going to reverse justice again." Certainly, this conversation would indicate that Connelly was aware of Schwimmer's plans to have both Departments committed on the Sachs case so that he need have no fear that the Bureau would render a ruling adverse to that which he obtained from the Justice Department. Moreover, it must be apparent that Connelly knew that Schwimmer had obtained a no-prosecution letter from Caudle at that time. The friendly relations between Connelly and Schwimmer and the six or seven or more telephone calls to government officials made by Connelly with reference to the Sachs case fully warranted the jury in determining that Connelly's relation with the case that was pending in the Bureau of Internal Revenue and then in the Department of Justice was something more than mere routine telephone calls for the arranging of appointments.

It is on the entire background disclosed by the evidence that one must appraise the oil royalty transaction between Connelly and Schwimmer. It occurred at a time when the case apparently had been stalled by Oliphant in the Internal Revenue Department for over a year and now was finally to be considered by the Department of Justice. Connelly was not a naive person, bereft of experience in business affairs and dealings with businessmen. He had been an investigator for one of the Senate Committees, and he was then occupying a position of considerable responsibility with the Administration in Washington. Therefore, when without any consideration paid by him, he received from Schwimmer in December, 1949, an oil royalty which later paid him some $1,400 in dividends and some $1,600 when it was sold, the jury had a right to draw such reasonable inferences and deductions from that incident that a reasonable person would deduce. When he discussed the

prospect of getting an oil royalty from Schwimmer and stated to Evans that he did not have $750 with which to make such an investment, he was immediately offered a loan in that amount by Evans, which he accepted. Thereafter, he sent Schwimmer his own check and Schwimmer repaid Evans the $750 which Evans had advanced to Connelly. It is inconceivable that Connelly did not know what had happened in this regard. He must have assumed that an oil royalty which would return about $60 per month must have cost more than $750. Schwimmer, of course, paid $3,600 for the royalty. The record is replete with incidents reflecting Schwimmer's prestige and standing in the Bureau of Internal Revenue and the Department of Justice during this period. The delays in the Bureau of Internal Revenue apparently were due to Oliphant's inaction. The delays in the formal preparation of the weighted medical report in favor of the taxpayer so as to produce an apparent basis for the application of the health policy of the Department of Justice was accomplished after the case had been forwarded to that department.

Connelly, who had interested himself in the Sachs case in both of these departments, was the recipient of a gift from which he realized nearly $3,000. If he assumed in good faith that he had paid $750 for the oil royalty, he must have known that Schwimmer provided him with an investment that paid the extraordinary return of one hundred per cent annually. And it is difficult to reconcile Connelly's claim of making a bona fide business investment in an oil royalty when it appears that when he testified before the grand jury, he was unable to state whether the royalty cost him $1,000 or $4,200. Is it reasonable, therefore, to assume that a man in public service holding a high political office would be the recipient of that type of an investment merely because of a few routine telephone appointments made as a courtesy to a friend? True, there were other matters in which Schwimmer was interested in Washington, such as the so-called helium matter, and as

to which Connelly had bestowed some favors upon Schwimmer, but the bulk of Schwimmer's business in Washington during the period in which Connelly was of help to him was the Sachs case. Connelly knew that the oil royalty checks payable to him came first to Schwimmer, and then would be mailed by Schwimmer in the latter's envelope stationery to Connelly's home address in Washington. The evidence, direct and circumstantial, links Connelly to the conspirator, Schwimmer, in a very close friendly basis, so close that Connelly accepted such personal items as new tailor-made suits and a top coat from the person who had bestowed upon him many courtesies when he had business in Washington.

I cannot say, therefore, that there is an absence of credible evidence to justify reasonable jurors in finding beyond a reasonable doubt that a prima facie conspiracy case was made out against Connelly and Caudle so as to justify consideration by the jury of Government's Exhibit 100-j, and if that exhibit constituted competent evidence against them, then it seems to me that there can be no real doubt as to the sufficiency of the evidence before the jury with reference to their guilt. This brings me, therefore, to a discussion of the competency of Government's Exhibit 100-j as evidence against each of these defendants.

(b) The record reflects that the relevancy and competency of Government's Exhibit 100-j gave Judge Hulen a great deal of concern and that he vacillated in passing upon this question. Finally, however, after considering the briefs that had been filed by counsel, he determined that in a conspiracy case the evidence was competent. The exhibit consists of a bound record book in which there are numerous entries in Schwimmer's handwriting, running from January, 1948, to December, 1950. Many of the entries referred to his account with the Shu-Stiles Company in this tax matter. Obviously, only those entries pertaining to Schwimmer's account with Shu-Stiles could be rele-

vant in this proceeding and the remaining entries were eliminated. Among the entries on a page captioned October, 1949, identified as Government's Exhibit 100-j, appears the following:

"Shu-Stiles	$10,000	
Pd out Oil Royalty M. C.	4,200	
Held in escrow to be paid out depending on whether I. Sachs case is dropped."		5,800

It is not disputed that this entry was made by Schwimmer during the existence of the alleged conspiracy, and, obviously, there is an abundance of evidence that would justify the jury in finding that Schwimmer was one of the conspirators as charged in the indictment. The evidence fully warrants a finding that when Schwimmer wrote the initials "M. C.", he was referring to the defendant Matthew Connelly, and that the entry related to the subject matter of this conspiracy. But the question arises as to whether or not the entry is competent evidence as to these defendants. Basically, that question depends on whether a prima facie conspiracy as charged in the indictment has been established without the benefit of this exhibit. If there was sufficient evidence for the jury to make an affirmative finding in that regard beyond a reasonable doubt, it would seem that there can be no real question that this entry was an act made by a conspirator during the existence of the conspiracy and in the furtherance thereof, and hence constituted competent evidence as to all members of the conspiracy. All acts relating to the negotiation, payment for, and disposition of the oil royalty were acts pursuant to and in furtherance of the conspiracy. It is established by competent evidence that Schwimmer received from Shu-Stiles the sum of $10,000 in October, 1949. Shortly after this payment, it appears that Schwimmer began to negotiate with Chris Rhodes for an

oil royalty interest for Connelly. The deal for the oil royalty was consummated for $3,600. There appears to be a discrepancy between the amount actually paid for the oil royalty and the amount that Schwimmer set up in his ledger as the anticipated payment therefor, but obviously this discrepancy does not affect the competency of the exhibit received in evidence—rather, it would go to its weight. It was on December 30, 1949, that the oil royalty purchase for Connelly was consummated. There was ample circumstantial evidence to warrant a finding without reference to Exhibit 100-j that when Schwimmer was paid $10,000 by Sachs in October, 1949, the money was paid for the purpose of enabling Schwimmer to purchase oil royalties for certain officials of the United States Government who were aiding Schwimmer in the Sachs case pending in Washington. When the jury was considering the sufficiency of the evidence regarding the complicity of Connelly and Caudle in this conspiracy, they had before them not only the fact that Connelly had received a substantial investment from Schwimmer, but that Caudle, who was directly handling the Sachs case in the Department of Justice, likewise received the same type of investment from Schwimmer, which cost substantially the same amount. Government's Exhibit 100-j does not represent the entry of a mere narrative event, but it consists of an act of a conspirator who was handling the fund by and through which the conspiracy was to be accomplished. The entry consists of a recording of the receipt of the first anticipated disbursement thereof and the earmarking of the remaining funds for the purpose of carrying out the conspiracy. To earmark or allocate the remainder of a slush fund which has been created for the purpose of consummating an unlawful conspiracy would be an act in furtherance of such conspiracy.

The defendants emphasize the dilemma in which they allegedly found themselves because of their inability to cross-examine Schwimmer with reference to Exhibit 100-j

and to obtain from him his testimony as to his construction of this entry, what it meant, why he recorded it, etc. Manifestly, this Court is in no position to determine to what extent, if any, the defendants may be prejudiced by their inability to obtain Schwimmer's testimony. His testimony might be helpful. On the other hand, it might be detrimental. The undeniable fact is, however, that through no fault of the Government, Schwimmer's testimany is not available to anyone. *Moreover, it does seem overwhelmingly clear, and one would be credulous to assume otherwise, that when Sachs paid the $10,000 to Schwimmer, the payment was made for the very purpose which thereafter was recorded by Schwimmer in this controverted document.* In other words, the evidence is strikingly persuasive that Schwimmer turned over the oil royalty to Connelly because of Connelly's aid and assistance in the Sachs case, and that he likewise turned over the oil royalty to Caudle because of the latter's assistance in that matter. Whether these two government officials, by reason of the acceptance of these oil royalties, corruptly used their power and influence to decline, or to aid and assist government officials in the declination of criminal prosecution of Sachs and Shu-Stiles, was, of course the ultimate fact question, dependent primarily upon circumstantial evidence, that the jury had to determine in passing upon the guilt or innocence of these two defendants. This exhibit does not stand alone without corroboration, without other facts and circumstances to sustain its verity, and while the Court has not assumed to discuss the admissibility of the exhibit under the so-called "shop book" rule or the Federal Business Records Act, there seems to be ample basis for sustaining Judge Hulen's ruling thereon on the premises heretofore set forth. In his instructions, Judge Hulen fairly stated to the jury the rule of law with reference to acts and declarations of other conspirators being binding upon the defendants on trial under certain circumstances, as follows:

"Not only must the unlawful conspiracy come into existence and the defendants or a defendant be a party to it, but, some one or more of the parties to the conspiracy must do some act to effect the object of the conspiracy. All parties to the conspiracy are responsible and chargeable, during the continuance of the conspiracy and while they are parties to it, with the acts done by any one or more of the parties to the conspiracy when done to effect the object of the conspiracy. So, if, in this case, you determine that either or both of the defendants was a party to the conspiracy charged, then such defendant or defendants as are shown to be parties to the conspiracy, are responsible for all acts committed by any other party or parties shown to be parties to such conspiracy during the time such defendant or defendants are parties to the conspiracy.

"I will state it another way: It is not necessary that each of the parties to the conspiracy shall have committed or joined in committing all acts of other conspirators to effect and carry out the objects of the conspiracy" (R. 3135-36).

That a case which involved so many incidents and events and which required so many days for trial presented a difficult problem for a jury is evident. However, they should have had no difficulty in determining that there was a conspiracy between Schwimmer and Sachs to effect the illegal acts set forth in the indictment. The difficult question is whether the evidence as to the complicity of each of these defendants in the conspiracy charged was susceptible of a finding that it is consistent only with that of guilt. In other words, it is clear that both Connelly and Caudle performed certain acts which tended to further the illegal conspiracy initiated by Schwimmer and Sachs. The crucial question is: Did they do so with an evil and corrupt intent, as charged in the indictment? The jury

concluded that they did. And after due consideration, the Court is of the opinion that the findings of the jury in this respect should not be disturbed.

It follows, therefore, that the respective motions of defendants Matthew J. Connelly and T. Lamar Caudle, and each of them, for a judgment of acquittal, or in the alternative for a new trial, must be, and the same hereby are, in all things denied. It is so ordered. Exceptions are reserved.

Sentence will be imposed on March 5, 1957, at nine o'clock A.M., at the United States Court House, St. Louis, Missouri.

Dated this 8th day of February, 1957.

By the Court:

Gunnar H. Nordbye,
Acting Under Assignment to
the Eastern District of
Missouri, Eastern Division.

APPENDIX D

Order of Court Below Denying Rehearing

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1957

No. 15746

Friday, December 13, 1957

MATTHEW J. CONNELLY and T. LAMAR CAUDLE, *Appellants*,

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri

The petition for rehearing filed by the appellants in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

December 13, 1957

APPENDIX E

Order Extending Time to File Certiorari

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. ———

MATTHEW J. CONNELLY, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 23, 1958.

/S/ CHARLES E. WHITTAKER
Associate Justice of the Supreme Court of the United States

Dated this 20th day of December, 1957

APPENDIX F

Constitutional Provisions, Statutes and Rules Involved

The *Fifth Amendment* to the *Constitution of the United States* provides in relevant part:

"• • • nor shall any person be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; * * * "

The *Sixth Amendment* to the *Constitution of the United States* provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * "

Section 1865(a) of *Title 28, United States Code*, provides in relevant part:

"Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. * * * "

Rule 25, Federal Rules of Criminal Procedure, provides:

"if by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

Rule 29(b), Federal Rules of Criminal Procedure, provides in relevant part:

"**Reservation of Decision on Motion.** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is

denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. * * * "

Rule 63, Federal Rules of Civil Procedure, provides:

"If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings or fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 739

MATTHEW J. CONNELLY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF

Respondent's Brief in Opposition is notable for its utter failure to deal with the considerations governing review on certiorari. It makes no attempt to answer petitioner's demonstration that the three questions presented are important and significant in the adminis-

tration of criminal justice in the Federal courts. Respondent's Brief is, at best, a discussion of the merits of the case—and a perfunctory and inaccurate one at that.

I. The Grand Jury

Respondent attempts to dismiss the question relating to the misuse of the grand jury as raising only the "narrow factual issue" of the exact date when the prosecutor determined to seek the indictment (Br. in Opp., p. 13). But that is not a fact in dispute.

Respondent misreads the record when it asserts that "It was on the evening of November 22, 1955 that the prosecutor decided to seek an indictment" of petitioner (Br. in Opp., p. 12). The prosecutor's own admission under oath was to the contrary. He stated that petitioner "appeared a potential defendant" and was "certainly * * * regarded by me on November 18 as having been involved in the conspiracy" (Tr. 264, Vol. I).[1] November 22nd was the date on which the first draft of the indictment was placed on paper, and that was it only importance.

And correction of this error, in turn, highlights another. There is no support whatever for the state-

[1] The record is unequivocal as to petitioner's position in the mind of the prosecution on the fateful day of November 18, 1955. The turning point in the Government's investigation was the seizure of Schwimmer's records which contained reference to certain financial transactions between Schwimmer, petitioner and Caudle (Tr. 313-14, Vol. I). Schwimmer was then called before the grand jury to explain on November 14, 15, 16, 1955 (Tr. 254, 305, Vol. I). On the 16th, as the prosecutor admitted, "when he [Schwimmer] claimed his privilege as to these financial transactions with Connelly and Caudle, I must state, in complete candor, that then I was sure there was a conspiracy" (Tr. 306, Vol. I).

ment that petitioner "was not only fully advised of his constitutional privilege but was specifically told that he was among those as to whom the grand jury was considering whether or not to take action" (Br. in Opp., p. 12). This statement blurs the distinction between Connelly's appearances before the grand jury on June 13, November 18, and November 21. On June 13, Connelly appeared in response to subpoena, and was warned—as any witness is warned—that he had the right to refuse to answer on grounds of self-incrimination. At that time, too, the inquiry was a broad one with no emphasis on the Sachs case. See Petition, fn. 4, p. 10. When Connelly appeared in response to a second subpoena on November 18, he was clearly marked as a potential defendant and he was not warned that he was about to be indicted. In consequence, he did not at that time "know the subject-matter of the inquiry," was not "fully advised of its implications," and was not "actively and voluntarily [seeking] to exculpate [himself] in the grand jury proceedings." (Compare Br. in Opp., p. 12). Full warning of his serious position was given to Connelly only at his third and voluntary appearance before the grand jury on November 21, but by this time the warning was too late. On November 18 he had already given testimony which was to be subsequently used at the trial to make out a prima facie case against him (See Pet., p. 15).

Thus, there is no dispute as to the facts; the dispute relates only to *the consequences of undisputed facts*. The question petitioner presents from these facts is whether he could properly have been called before the grand jury at a time when he was a target marked for prosecution, without first being advised of his true

position. He concedes that on November 18th, no indictment or draft of an indictment was in being; but contends that he was at that time a *de facto* defendant because the prosecutor had already decided to indict him. Respondent, by contrast, appears to contend that petitioner was entitled to a warning only after an indictment, or a draft of an indictment, had been prepared.

The difference in position is the difference between substance and form; and it is also a difference which has resulted in divergent views in the cases. See *United States* v. *Edgerton* (D. Mont., 1897) 80 F. 374; *United States* v. *Klein* (C.A. 2, 1957), 247 F. 2d 908, 920, cert. den. 355 U.S. 924; *United States* v. *Grossman* (D. N.J., 1957) 154 F. Supp. 813, 816-817. At least one circuit has confessed to "some difficulty in establishing a clear cut rule as to the necessity of warning under these circumstances." *United States* v. *Klein, supra,* at 920. Until the diversity of view reflected in the cases is resolved by this Court, a fundamental constitutional right will remain ambiguous and a defendant—such as the petitioner in this case—will find that he can be compelled to be a witness against himself.

II. The Petit Jury

Petitioner has presented the question of whether the failure by two jurors truthfully to respond to the trial judge's question deprived him of his right intelligently to exercise his peremptory challenges. Petitioner has also claimed that the decision of the courts below on this issue is in irreconcilable conflict with the *en banc* decision of the Third Circuit in *United States ex rel. de Vita* v. *McCorkle* (C.A. 3. 1957), 248 F. 2d

1, cert. den. 355 U.S. 873. Respondent has failed to join issue on the question presented and has treated the McCorkle decision as an uninvited visitor that it would just as soon forget.[2]

Respondent's contentions on this issue seem to be that only concealment which is deliberate is disqualifying and that the information concealed must be of such a nature as would require disqualification for cause. In each instance, the Government is wrong. *Clark* v. *United States*, 289 U.S. 1, 11, and the other cases cited at page 23 of the Petition, indicate that one of the purposes of the *voir dire* examination is to insure a fair trial by enabling the parties intelligently to exercise the right of peremptory challenge. An essential prerequisite to the exercise of this right is truthful and complete disclosure by jurors. If the information concealed is relevant, it makes no difference whether a failure to disclose is deliberate or unintentional. The failure to disclose in itself is harmful. As long as the right to peremptory challenges is the criterion, the dis-

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[2] Respondent attempts to relegate *McCorkle* to the category of cases of deliberate concealment and actual bias in which a challenge for cause would be appropriate (Br. in Opp., p. 19). Nothing in the holding or language of *McCorkle* justifies such a reading. The Third Circuit expressly approved the decision of the New Jersey Supreme Court in *Wright* v. *Bernstein*, 23 N.J. 284, 294, 129 A. 2d 19, 24 (1957) which contained the following:

> ". . . there can be no doubt had the prospective juror answered the inquiry truthfully, he would have been peremptorily challenged, if the court overruled a challenge for cause. Therefore, the question is whether the right of challenge was denied by the prospective juror's failure to disclose the information sought pertinent and necessary to the decision of counsel. . . ." 248 F. 2d at 7.